

## SUBCHAPTER A—GENERAL

### PART 301—HHS ACQUISITION REGULATION SYSTEM

#### Subpart 301.1—Purpose, Authority, Issuance

Sec.

- 301.101 Purpose.
- 301.102 Authority.
- 301.103 Applicability.
- 301.104 Issuance.
- 301.104-1 Publication and code arrangement.
- 301.104-2 Arrangement of regulations.
- 301.104-3 Copies.
- 301.105 OMB approval under the Paperwork Reduction Act.

#### Subpart 301.2—Administration

- 301.201 Maintenance of the HHSAR.
- 301.270 Executive Committee for Acquisition.
- 301.271 Timing of HHSAR revisions.

#### Subpart 301.3—Agency Acquisition Regulations

- 301.301 Policy.
- 301.302 Limitations.
- 301.303 Publication and codification.
- 301.304 Agency control and compliance procedures.

#### Subpart 301.4—Deviations From the FAR

- 301.403 Individual deviations.
- 301.404 Class deviations.
- 301.470 Procedure.

#### Subpart 301.5—Agency and Public Participation

- 301.501 Solicitation of agency and public views.
- 301.501-2 Opportunity for public comments.
- 301.501-3 Exceptions.
- 301.503 Public meetings.

#### Subpart 301.6—Contracting Authority and Responsibility

- 301.602-3 Ratification of unauthorized commitments.
- 301.603 Selection, appointment, and termination of appointment.
- 301.603-1 General.
- 301.603-2 Selection.
- 301.603-3 Appointment.
- 301.603-4 Termination.
- 301.603-70 Delegation of contracting officer responsibilities.
- 301.670 Head of the contracting activity.
- 301.670-1 Responsibility.

- 301.670-2 Designation.
- 301.670-3 Redlegation.

#### Subpart 301.7—Determinations and Findings

- 301.703 Class determinations and findings.
- 301.704 Content.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 13961, Apr. 9, 1984, unless otherwise noted.

#### Subpart 301.1—Purpose, Authority, Issuance

##### 301.101 Purpose.

(a) The Department of Health and Human Services Acquisition Regulation (HHSAR) is issued to establish uniform acquisition policies and procedures for the Department of Health and Human Services (HHS) which conform to the Federal Acquisition Regulation (FAR) System.

(b) The HHSAR implements and supplements the FAR. (Implementing material expands upon or indicates the manner of compliance with related FAR material. Supplementing material is new material which has no counterpart in the FAR.)

(c) The HHSAR contains all formal departmental policies and procedures that govern the acquisition process or otherwise control contracting relationships between the Department's contracting offices and contractors.

##### 301.102 Authority.

The HHSAR is prescribed by the Assistant Secretary for Management and Budget under the authority of 5 U.S.C. 301 and section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary. The Assistant Secretary for Management and Budget has redelegated the authority to establish all departmental acquisition policy and publish all acquisition regulations to the Deputy Assistant Secretary for Management and

### 301.103

Acquisition. This authority is not re-delegable.

[49 FR 13961, Apr. 9, 1984, as amended at 54 FR 24342, June 7, 1989]

#### 301.103 Applicability.

The FAR and HHSAR apply to all HHS acquisitions as stated in FAR 1.103. Unless specified otherwise, these regulations apply to acquisitions within and outside the United States.

#### 301.104 Issuance.

##### 301.104-1 Publication and code arrangement.

(a) The HHSAR is also published in the same forms as indicated in FAR 1.104-1(a).

(b) The HHSAR is issued in the Code of Federal Regulations (CFR) as Chapter 3 of Title 48, Department of Health and Human Services Acquisition Regulation. It may be referenced as "48 CFR Chapter 3."

##### 301.104-2 Arrangement of regulations.

(a) *General.* The HHSAR conforms to the FAR with respect to divisional arrangements; i.e., subchapters, parts, subparts, sections, subsections, and paragraphs.

(b) *Numbering.* The FAR System of numbering permits the keying of the same or similar subject matter throughout Chapters 1 (FAR) and 3 (HHSAR). However, unlike the FAR numbering scheme, our scheme varies somewhat in the numbering to the left of the decimal point. Whereas the FAR only identifies the part number to the left of the decimal point, our corresponding reference identifies the chapter as well. For example, this corresponding paragraph in the FAR is numbered 1.104-2(b) where "1" is the part number (may be one or two digits and is followed by a decimal point), "1" (to the right of the decimal point) is the subpart number, "04" (always two digits) is the section number, "2" is the subsection number (always hyphenated), and "(b)" is the paragraph reference. The corresponding HHSAR reference is 301.104-2(b) where the "3" or first digit is the chapter number assigned to the particular department or agency (may be two digits) and the "01" represents the part number (part

### 48 CFR Ch. 3 (10-1-97 Edition)

numbers will always be two digits for agencies implementing the FAR). The remaining numbers are identical to and represent the same divisions as the FAR example.

(c) *References and citations.* (1) Unless otherwise stated, references, indicate parts, subparts, sections, subsections, etc., of this regulation, the HHSAR.

(2) This regulation shall be referred to as the Department of Health and Human Services Acquisition Regulation (HHSAR). Any reference may be cited as "HHSAR" followed by the appropriate number. Within the HHSAR, the number alone will be used.

(3) Citations of authority shall be incorporated where necessary. All FAR reference numbers shall be preceded by "FAR".

#### 301.104-3 Copies.

Copies of the HHSAR in FEDERAL REGISTER and CFR form may be purchased by the public from the Superintendent of Documents, Government Printing Office (GPO), Washington, DC 20402. Lose-leaf copies of the HHSAR may be obtained by departmental personnel having a need for the document by placing an order with a Directives Distribution Coordinator in accordance with General Administration Manual Chapter 1-00, HHS Staff Manual System.

#### 301.105 OMB approval under the Paperwork Reduction Act.

The following OMB control numbers apply to the information collection and recordkeeping requirements contained in this regulation:

HHSAR segment	OMB control no.
315.4 .....	0990-0139
324.70 .....	0990-0136
332.406 .....	0990-0134
342.7103 .....	0990-0131
352.215-71 .....	0990-0139
352.216-70 .....	0990-0138
352.224-70 .....	0990-0136
352.228-70 .....	0990-0135
352.232-71 .....	0990-0134
352.232-73 .....	0990-0134
352.233-70 .....	0990-0133
352.270-1 .....	0990-0129
352.270-2 .....	0990-0129
352.270-3 .....	0990-0129
352.270-5 .....	0990-0130
370.1 .....	0990-0129
370.2 .....	0990-0129

The OMB control number "OMB No. 0990-0115" is to be included in the upper right corner of the first page of all solicitations, purchase orders, and contracts issued by departmental contracting activities. The number represents approval of the HHS acquisition process and covers recordkeeping and reporting requirements which are unique to individual acquisitions (e.g., requirements contained in specifications, statements of work, etc.).

[49 FR 13961, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 51 FR 44293, Dec. 9, 1986; 53 FR 15562, May 2, 1988]

### Subpart 301.2—Administration

#### **301.201 Maintenance of the HHSAR.**

(a) The HHSAR is prepared and issued under the authority of the Deputy Assistant Secretary for Management and Acquisition. Acquisition policies and procedures which are necessary to implement, supplement, or deviate from the FAR will be issued in the HHSAR by the Deputy Assistant Secretary for Management and Acquisition when necessary to accomplish Department-wide acquisition objectives.

(b) The HHSAR is maintained by the Office of Acquisition and Grants Management. The Director, Office of Acquisition and Grants Management is responsible for developing and preparing for issuance all acquisition regulatory material to be included in the HHSAR.

[49 FR 13961, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 54 FR 24342, June 7, 1989]

#### **301.270 Executive Committee for Acquisition.**

(a) The Deputy Assistant Secretary for Management and Acquisition has established the Executive Committee for Acquisition (ECA) to assist and facilitate the planning and development of departmental acquisition policies and procedures and to assist in responding to other agencies and organizations concerning policies and procedures impacting the Federal acquisition process.

(b) The ECA consists of members and alternates from the Office of Acquisition and Grants Management, Division

of Contract Operations-OS, Office of Human Development Services, Health Care Financing Administration, Social Security Administration, Public Health Service, and, collectively, the regional offices. The ECA is chaired by the Director, Office of Acquisition and Grants Management. All meetings will be held at the call of the Chairman, and all activities will be carried out under the direction of the Chairman.

(c) The ECA, to facilitate the planning, development, and coordination of government-wide and department-wide acquisition policies and procedures, is to:

(1) Advise and assist the Chairman concerning major acquisition policy matters;

(2) Review and appraise, at appropriate intervals, the overall effectiveness of existing policies and procedures; and

(3) Review and appraise the impact of new major acquisition policies, procedures, regulations, and developments on current acquisition policies and procedures.

(d) The Chairman will periodically issue a list of current members and alternates specifying the name, title, organization, address, and telephone number of each. The member organizations are responsible for apprising the Chairman whenever a new member or alternate is to be appointed to the ECA.

[49 FR 13961, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 54 FR 24342, June 7, 1989]

#### **301.271 Timing of HHSAR revisions.**

HHSAR revisions will be issued throughout the year as the need arises. HHSAR material shall become effective on the date cited in the FEDERAL REGISTER issuance or on the date of the transmittal notice which distributes it to HHSAR Staff Manual holders, unless otherwise indicated.

### Subpart 301.3—Agency Acquisition Regulations

#### **301.301 Policy.**

(a)(1) The FAR and HHSAR are intended to provide all necessary regulatory guidance for the conduct of the

acquisition process within the Department. However, there may be some rare instances where regulations are necessary to implement and/or supplement the FAR and/or HHSAR at the Operating Division (OPDIV) level or lower. The Department discourages the proliferation of OPDIV and lower level issuances, but will allow lower level issuances when deemed pertinent.

[49 FR 13961, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

### **301.302 Limitations.**

The same limitations applicable to the FAR also apply to the HHSAR.

### **301.303 Publication and codification.**

(a) The HHSAR shall be codified in Chapter 3 of Title 48, Code of Federal Regulations. Any OPDIV or lower implementation or supplementation of the HHSAR or FAR shall also be codified as part of Chapter 3. Implementing material is that which expands upon or indicates the manner of compliance with related higher level material. Supplementing material is that for which there is no counterpart. Where material in the FAR requires no implementation, there will be no corresponding number in the HHSAR. Thus, there are gaps in the HHSAR sequence of numbers where the FAR, as written, is deemed adequate. Supplementary material shall be numbered as specified in FAR 1.303.

[49 FR 13961, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

### **301.304 Agency control and compliance procedures.**

(a) Whenever an OPDIV or lower level organization determines a need for an acquisition regulation not covered by the FAR or HHSAR or wishes to implement or supplement the coverage in either, the organization shall prepare a memorandum that explains the need, background, justification, and significant aspects of the proposed regulation and send it, together with an outline, to the Director, Office of Acquisition and Grants Management. The Director will analyze the request to determine if it has applicability to the HHSAR or FAR; if not, the Direc-

tor will either approve or disapprove the request for incorporation into the organization's acquisition regulation. If the request is approved, the organization must prepare the proposed regulation in FEDERAL REGISTER format, obtain all necessary concurrences, including Office of General Counsel—Business and Administrative Law Division, and send it to the Director, Office of Acquisition and Grants Management for review and approval. The regulation must be prepared for signature by the Deputy Assistant Secretary for Management and Acquisition. All regulations will be required to be processed through the public rulemaking process in the FEDERAL REGISTER.

(b) Only the organizations listed in paragraph (d) are authorized to establish acquisition regulations. As of the date of issuance of the HHSAR, no acquisition regulations below the HHSAR level exist, and the procedures detailed in paragraph (a) must be followed to initiate the establishment of an OPDIV or lower level regulation.

(c) Under no circumstances shall any organization's implementation or supplementation of the FAR or HHSAR conflict with, supersede, or repeat, paraphrase, or otherwise restate policies or procedures prescribed by these regulatory issuances. OPDIV or lower level material shall follow the numbering system, format, and arrangement of the FAR and HHSAR and will be applicable only within the organization issuing it. One copy of all OPDIV or lower level material issued in loose-leaf format shall be furnished the Director, Office of Acquisition and Grants Management at the times of issuance.

(d) Material issued by OPDIV or lower level organizations to implement and supplement the HHSAR and FAR shall be identified by prefixes to the digit 3 (indicating Chapter 3–HHSAR) as follows, and shall use the same numbering system as the HHSAR:

Organization	Prefix
Office of the Secretary .....	OS
Health Care Financing Administration .....	HCFA
Office of Human Development Services .....	OHDS
Public Health Service .....	PHS
Alcohol, Drug Abuse, and Mental Health Administration .....	ADAMHA
Centers for Disease Control .....	CDC
Food and Drug Administration .....	FDA

## Department of Health and Human Services

301.501-2

Organization	Prefix
Health Resources and Services Administration.	HRSA
Indian Health Service .....	IHS
National Institutes of Health .....	NIH
Social Security Administration .....	SSA

Each OPDIV or lower level acquisition regulation will be included in its entirety as a separate appendix to 48 CFR Chapter 3. The Director, Office of Acquisition and Grants Management will assign the appendix designation upon approval of the initial request to establish the OPDIV or lower level acquisition regulation.

[49 FR 13961, Apr. 9, 1984, as amended at 49 FR 36110, Sept. 14, 1984; 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 53 FR 43206, Oct. 26, 1988, 54 FR 24342, June 7, 1989]

### Subpart 301.4—Deviations From the FAR

#### 301.403 Individual deviations.

Requests for individual deviations to either the FAR or HHSAR shall be prepared in accordance with 301.470 and forwarded through administrative channels to the Director, Office of Acquisition and Grants Management for review and approval.

[49 FR 13961, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 54 FR 24342, June 7, 1989]

#### 301.404 Class deviations.

Requests for class deviations to either the FAR or HHSAR shall be prepared in accordance with 301.470 and forwarded through administrative channels to the Deputy Assistant Secretary for Management and Acquisition for review and approval.

[49 FR 13961, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 54 FR 24342, June 7, 1989]

#### 301.470 Procedure.

(a) When a contracting activity or contracting office determines that a deviation is needed, it shall prepare a deviation request in memorandum form and forward it through administrative channels to the official designated as stated in 301.403 or 301.404. In an exigency situation, the contracting activity or contracting office may re-

quest a deviation verbally, but is required to confirm the request in writing as soon as possible.

(b) A deviation request shall clearly and precisely set forth the:

- (1) Nature of the needed deviation;
- (2) Identification of the FAR or HHSAR from which the deviation is needed;
- (3) Circumstances under which the deviation would be used;
- (4) Intended effect of the deviation;
- (5) Time-frame; and
- (6) Reasons which will contribute to complete understanding and support of the requested deviation. A copy of pertinent background papers such as a form or contractor's request should accompany the deviation request.

[49 FR 13961, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 54 FR 24342, June 7, 1989]

### Subpart 301.5—Agency and Public Participation

#### 301.501 Solicitation of agency and public views.

[49 FR 13961, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

#### 301.501-2 Opportunity for public comments.

(b) Public opportunity for comment on proposed changes or additions to the HHSAR or lower level acquisition regulations will be offered whenever the proposed regulation will have an impact on the public and/or contractors. This will be accomplished by publishing a notice of proposed rulemaking in the FEDERAL REGISTER which will include the proposed language and the background and rationale for the proposed regulation. Comments will not be solicited directly from professional or industry associations or other interested parties; they will be expected to respond based upon the FEDERAL REGISTER notification. Normally, the public will be given 45 days to comment. Proposed changes or additions to the HHSAR or FAR shall be staffed to the

### 301.501-3

Executive Committee for Acquisition in accordance with 301.270.

[49 FR 13961, Apr. 9, 1984. Redesignated and amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

#### **301.501-3 Exceptions.**

(e) Comments will not be solicited from the public when the change or addition to the HHSAR or lower level acquisition regulation is deemed procedural in nature and concerns internal administrative directions aimed at departmental personnel (see FAR 1.301(b)).

[49 FR 13961, Apr. 9, 1984, as amended at 49 FR 36110, Sept. 14, 1984. Redesignated and amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

#### **301.503 Public meetings.**

Public meetings will not normally be used to solicit comments or views on HHSAR or lower level acquisition regulations. However, when the topic is so controversial that the Department or OPDIV believes a public meeting would be beneficial, public meetings will be convened.

[49 FR 13961, Apr. 9, 1984. Redesignated at 50 FR 23127, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

### **Subpart 301.6—Contracting Authority and Responsibility**

SOURCE: 53 FR 15562, May 2, 1988, unless otherwise noted.

#### **301.602-3 Ratification of unauthorized commitments.**

(b) *Policy.* (1) The Government is not bound by agreements or contractual commitments made to prospective contractors by persons to whom contracting authority has not been delegated. However, execution of otherwise proper contracts made by individuals without contracting authority, or by contracting officers in excess of the limits of their delegated authority, may be later ratified. The ratification must be in the form of a written document clearly stating that ratification of a previously unauthorized act is intended and must be signed by the head of the contracting activity (HCA).

### 48 CFR Ch. 3 (10-1-97 Edition)

(2) The HCA or his/her designee is the official authorized to ratify an unauthorized commitment (but see (b)(3), below).

(3) Ratification authority may be re-delegated by the HCA, but not below the level of the principal official responsible for acquisition (PORA).

(c) *Limitations.* (5) The concurrence of legal counsel concerning the payment issue is optional.

(7) The ratification shall be in written document form containing verification of each limitation stated in FAR 1.602-3(c)(1)-(6), and shall be processed in accordance with 301.602-3(e) *Procedures*.

(e) *Procedures.* (1) The individual who made the unauthorized contractual commitment shall furnish the reviewing contracting officer all records and documents concerning the commitment and a complete written statement of facts, including, but not limited to: a statement as to why the contracting office was not used, a statement as to why the proposed contractor was selected, a list of other sources considered, a description of work to be performed or products to be furnished, the estimated or agreed contract price, a citation of the appropriation available, and a statement of whether the contractor has commenced performance.

(2) The contracting officer will review the submitted material, and prepare the ratification document if he/she determines that the commitment may be ratifiable. The contracting officer shall forward the ratification document and the submitted material to the HCA or designee with any comments or information which should be considered in evaluation of the request for ratification. If legal review is desirable, the HCA or designee will coordinate the request for ratification with the Office of General Counsel, Business and Administrative Law Division.

(3) If ratification is authorized by the HCA or designee, the file will be returned, along with the ratification document, to the contracting officer for issuance of a purchase order or contract, as appropriate.

(4) HCA's or their designees will report the number and dollar value of requests for ratifications received and

ratifications authorized each calendar quarter. Reports shall be submitted in an original and one copy to the Deputy Assistant Secretary for Management and Acquisition to arrive no later than 30 calendar days after the close of each calendar quarter.

[53 FR 43206, Oct. 26, 1988]

**301.603 Selection, appointment, and termination of appointment.**

**301.603-1 General.**

(a) The appointment and termination of appointment of contracting officers shall be made by the principal official responsible for acquisition (PORA). This authority is not delegable. The head of the contracting activity shall ensure that only the PORA is redelegated, and exercises, this authority.

(b) Only GS-1105 and 1106 and GS/GM-1101 and 1102 personnel shall be appointed as contracting officers (see 301.603-3(b)).

(c) The appointment of contracting officers shall be made at one of the four levels specified under the HHS Acquisition Certification Program (see 301.603-3(b)).

(d) An individual shall be appointed only in instances where a valid organizational need for a contracting officer can be demonstrated or a replacement position is to be filled. Factors to be considered in assessing the need for a contracting officer appointment include volume of actions, complexity of work, and structure of the organization.

**301.603-2 Selection.**

(a) When an organizational need for a contracting officer is determined or a replacement is required, an official (usually the prospective contracting officer's immediate supervisor) will nominate a contracting officer candidate. The nomination shall be accompanied by the candidate's current Standard Form (SF) 171, Personal Qualifications Statement, that contains all relevant information, to include that stated in FAR 1.603-2, a copy of the nominee's most recent performance appraisal, and a copy of the certificate issued under the HHS Acquisition Certification Program indicating the current level of certification.

(b) The PORA shall review the submitted material to determine the candidate's ability to perform the contracting functions required to meet the organizational need. If the PORA requires additional information to make the decision, it shall be provided expeditiously by the nominating official.

**301.603-3 Appointment.**

(a) Contracting officer appointments shall become effective when the PORA signs the Standard Form 1402, Certificate of Appointment. SF 1402's shall be prepared and maintained in accordance with FAR 1.603-3.

(b) Appointments shall be made at one of the four levels established by the HHS Acquisition Certification Program. Therefore, the contracting officer candidate must meet the minimum eligibility requirements of certification for one of the four stated levels. The level will be determined by the organizational need or position being refilled (replacement). The four levels are as follows:

(1) *Level I—Purchasing Agent.* Mandatory for all personnel who have signature authority for small purchases (GS-1102, 1105, and 1106), including orders from GSA sources.

(2) *Level II—Acquisition Official.* Mandatory for those in the GS-1102 series. Sufficient for delegation of contracting officer authority to a maximum of \$100,000.

(3) *Level III—Senior Acquisition Official.* Mandatory for those in the GS-1102 series for delegation of contracting officer authority above \$100,000.

(4) *Level IV—Acquisition Manager.* Mandatory for preaward review and approval authority as specified in HHSAR Subpart 304.71.

(c) Changes to contracting officer appointments, either increasing or decreasing the warrant limitations, shall be made by the PORA. Changes must be made from one of the four certification levels to another, or within one of the certification levels, and must be implemented by the PORA's issuance of a new SF 1402 to replace the existing SF 1402.

(d) Personnel shall not ordinarily be appointed as contracting officers if they do not meet the qualifications

prescribed for one of the four certification levels. However, if it is essential to appoint a contracting officer who does not fully meet the certification qualifications, an interim appointment may be granted by the PORA. The PORA shall require as a condition of the interim appointment that all training or experience requirements be met within a six month time period. Usually, interim appointments shall not exceed six months. Failure to successfully complete the necessary training requirements or gain the experience within this time frame will result in termination of the appointment, unless the PORA determines that unusual circumstances prevented the attainment of either. In this instance, one additional six month interim appointment may be issued, but no more shall be allowed. The PORA shall fully document all interim appointment actions.

(e) The original SF 1402 shall be provided to the contracting officer, and a copy shall be retained by the PORA. Another copy of the SF 1402 along with the SF 171 material shall be forwarded to the servicing personnel office for inclusion in the individual's personnel file folder. Files on individuals should not be established by the PORA.

#### **301.603-4 Termination.**

Termination of contracting officer appointments shall be executed by the PORA in accordance with FAR 1.603-4.

#### **301.603-70 Delegation of contracting officer responsibilities.**

(a) Non-GS/GM-1101 or 1102 or GS-1105 or 1106 personnel shall only be delegated contracting officer responsibilities when determined necessary by a warranted contracting officer (holder of a valid SF 1402), and in accordance with this subsection. Personnel, such as a contracting officer's representative or an ordering officer, shall be delegated only the needed responsibilities by the warranted contracting officer in a written memorandum of delegation which clearly states any limitations on the delegation. Personnel who are not in the GS/GM-1101 or 1102 or GS-1105 or 1106 job series shall not be issued a SF 1402, Certificate of Appointment.

(b) Non-acquisition personnel who are delegated acquisition responsibil-

ities shall be required to have the training, experience, and education requirements necessary for the responsibilities assigned. If, for example, responsibility is to be delegated for making small purchases, the training, education, and experience for Level I—Purchasing Agent, or its equivalent as determined by the PORA, shall be required.

#### **301.670 Head of the contracting activity.**

##### **301.670-1 Responsibility.**

The head of the contracting activity (HCA) is responsible for conducting an effective and efficient acquisition program. Adequate controls shall be established to assure compliance with applicable laws, regulations, procedures, and the dictates of good management practices. Periodic reviews shall be conducted by qualified personnel, preferably assigned to positions other than in the contracting office being reviewed, to determine the extent of adherence to prescribed policies and regulations, and to detect a need for guidance and/or training.

##### **301.670-2 Designation.**

Each OPDIV head and PHS agency head has been designated as HCA along with the following officials:

- (a) Deputy Assistant Secretary for Management and Acquisition; and
- (b) Each Regional Director.

[53 FR 15562, May 2, 1988, as amended at 54 FR 24342, June 7, 1989]

##### **301.670-3 Redelegation.**

(a) The heads of contracting activities may redelegate their HCA authorities to the extent that redelegation is not prohibited by the terms of their respective delegations of authority, by law, by the Federal Acquisition Regulation, by the HHS Acquisition Regulation, or by other regulations. However, HCA and other contracting approvals and authorities shall not be redelegated below the levels specified in the HHS Acquisition Regulation or, in the

absence of coverage in the HHS Acquisition Regulation, the Federal Acquisition Regulation. To ensure proper control of redelegated acquisition authorities, HCA's shall maintain a file containing successive delegations of HCA authority through and including the contracting officer level.

(b) Personnel delegated responsibility for acquisition functions must possess a level of experience, training, and ability commensurate with the complexity and magnitude of the acquisition actions involved.

### Subpart 301.7—Determinations and Findings

SOURCE: 50 FR 23127, May 31, 1985 (interim rule) and 50 FR 38004, Sept. 19, 1985 (final rule), unless otherwise noted.

#### 301.703 Class determinations and findings.

(b) All class determinations and findings (D&F's) shall be limited to a period of one year or less.

#### 301.704 Content.

An example of a D&F format may be found in 316.301-3(c). All D&F's shall be prepared using the referenced format and shall include the information required by FAR 1.704(a)-(g).

## PART 302—DEFINITIONS OF WORDS AND TERMS

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

### Subpart 302.1—Definitions

#### 302.100 Definitions of terms.

*Chief of the contracting office (CCO)* is a mid-level management official in charge of a contracting office who controls and oversees the daily contracting operation of an Operating Division (OPDIV) or major component of an OPDIV. The CCO is subordinate to the principal official responsible for acquisition and is located at a management level above other contracting personnel, usually as a branch chief.

*Head of the agency* or *agency head* means the head of the Operating Division (OPDIV) for HCFA, OHDS, PHS, and SSA, or the Assistant Secretary

for Management and Budget (ASMB) for the Office of the Secretary (OS).

*Head of the contracting activity (HCA)*—see 301.670-2.

*Principal official responsible for acquisition (PORA)* is defined in terms of certain organizational positions within the Office of Management and Acquisition (OMAC-OS), Health Care Financing Administration (HCFA), Office of Human Development Services (OHDS), Office of the Assistant Secretary for Health (OASH), Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA), Centers for Disease Control (CDC), Food and Drug Administration (FDA), Health Resources and Services Administration (HRSA), Indian Health Service (IHS), National Institutes of Health (NIH), Social Security Administration (SSA), and the Regional Offices (RO's), as follows:

*OMAC-OS*—Director, Division of Contract Operations

*HCFA*—Director, Office of Acquisition and Grants, Office of Budget and Administration

*OHDS*—Director, Grants and Contracts Management Division, Office of Management Services

*OASH*—Director, Division of Acquisitions Management, Administrative Services Center, Office of Management

*ADAMHA*—Director, Division of Grants and Contracts Management, Office of the Administrator

*CDC*—Director, Procurement and Grants Office, Office of the Center Director

*FDA*—Director, Division of Contracts and Grants Management, Office of the Associate Commissioner for Management and Operations

*HRSA*—Director, Division of Grants and Procurement Management, Office of Management

*IHS*—Director, Division of Contracts and Grants Policy, Office of Administration and Management

*NIH*—Director, Division of Contracts and Grants, Office of Administration

*SSA*—Associate Commissioner, Office of Acquisition and Grants

*RO's*—Director, Regional Administrative Support Center

The PORA is subordinate to the head of the contracting activity and is the official in charge of the major contracting operation activity within the

**Pt. 303**

OPDIV, agency, staff office, or regional office.

[49 FR 13964, Apr. 9, 1984, as amended at 51 FR 23231, June 26, 1986; 51 FR 44293, Dec. 9, 1986; 52 FR 27558, July 22, 1987; 53 FR 43207, Oct. 26, 1988; 54 FR 24342, June 7, 1989; 55 FR 13536, Apr. 11, 1990; 56 FR 47002, Sept. 17, 1991]

**PART 303—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST**

**Subpart 303.1—Safeguards**

Sec.

- 303.101 Standards of conduct.
- 303.101-3 Agency regulations.
- 303.104 Procurement integrity.
- 303.104-4 Definitions.
- 303.104-5 Disclosure of proprietary and source selection information.
- 303.104-6 Restrictions on Government officials, employees, and consultants.
- 303.104-9 Certification requirements.
- 303.104-11 Processing violations or possible violations.
- 303.104-12 Ethics program training requirements.

**Subpart 303.2—Contract Gratuities to Government Personnel**

- 303.203 Reporting suspected violations of the Gratuities clause.

**Subpart 303.3—Report of Suspected Antitrust Violations**

- 303.303 Reporting suspected antitrust violations.

**Subpart 303.4—Contingent Fees**

- 303.408 Evaluation of the SF 119.
- 303.408-1 Responsibilities.
- 303.409 Misrepresentations or violations of the Covenant Against Contingent Fees.

**Subpart 303.5—Other Improper Business Practices**

- 303.502 Subcontractor kickbacks.

**Subpart 303.6—Contracts With Government Employees or Organizations Owned or Controlled by Them**

- 303.602 Exceptions.

**Subpart 303.7—Voiding and Rescinding Contracts**

- 303.704 Policy.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

**48 CFR Ch. 3 (10-1-97 Edition)**

SOURCE: 49 FR 13964, Apr. 9, 1984, unless otherwise noted.

**Subpart 303.1—Safeguards**

SOURCE: 54 FR 31528, July 31, 1989, unless otherwise noted.

**303.101 Standards of conduct.**

**303.101-3 Agency regulations.**

The Department of Health and Human Services' Standards of Conduct are prescribed in Part 73 of Title 45.

**303.104 Procurement integrity.**

**303.104-4 Definitions.**

(h)(1) *Procurement official* means any individual who has participated personally and substantially in the conduct of a procurement. The following classes of employees may be considered procurement officials depending on the circumstances prevailing in a given case: contracting officers, contract specialists, contract administrators, procurement agents, procurement clerks, cost/price analysts, procurement analysts, clerical support and administrative personnel, auditors, professional staff of the Division of Cost Allocation, acquisition review and approval officials, contract clearance staff, board of award members, supervisory procurement officials, small and disadvantaged business utilization specialists, project officers, project managers, program officials, officials who provide special program clearances and approvals, program managers, technical evaluation panelists, peer reviewers, source selection evaluation board members, source selection advisory council members, source selection authorities, finance officials, and procurement lawyers. Concept peer reviewers are not considered to be procurement officials when participating in project concept reviews pursuant to 42 CFR 52h.10(a). However, concept peer reviewers, or other peer reviewers, who participate in a project approach review are procurement officials. When there is a question whether an individual is a procurement official, the activities of the individual should be analyzed by the contracting officer to determine

whether there is both personal and substantial involvement in a procurement. If there is doubt in a particular case, the doubt should be resolved by including the individual as a procurement official. The contracting officer has the authority to decide who is or who is not a procurement official in a particular case. The opinion of the Office of the General Counsel (OGC) should be requested when the contracting officer believes the situation is particularly complex or sensitive. When the contracting officer's decision is disputed by the individual whose status as a procurement official is in question, the matter will be referred to the Principal Official Responsible for Acquisition (PORA) for a final determination.

(k)(1) *Source selection information* includes "derivative documents" which are documents containing references to or directly citing or paraphrasing proprietary or source selection information.

**303.104-5 Disclosure of proprietary and source selection information.**

(a) The contracting officer or any other individual who prepares, makes or controls proprietary, source selection information, or derivative documents shall—

(1) Ensure documents are marked as prescribed in FAR 3.104-4 (j) and (k);

(2) Provide physical security for documents in the office environment during and after duty hours; and

(3) Ensure security of interoffice mailing of documents by using opaque envelopes, double wrapping with more than one envelope, and sealing of envelopes, as necessary.

(b) Individuals responsible for preparing derivative documents are responsible for marking such documents in accordance with FAR 3.104-5(b).

(c) Only the contracting officer has the authority to authorize individuals, or classes of individuals, access to proprietary or source selection information for each procurement except for paragraph (d) of this section.

(d) The following classes of individuals are authorized blanket access to only that source selection information developed before a request for contract is sent to the contract office, or to

later modifications or supplements to such information—

(1) The generators of the requirements, including program, scientific, and technical experts involved in the development of the statements of work, specifications, evaluation plans, budget estimates, or similar documents;

(2) Reviewing officials; and

(3) Supervisors in the management chain of the individuals listed in paragraphs (d) (1) and (2) of this section. The contracting officer shall include in the contract file names and functions of any other individuals authorized access to proprietary or source selection information.

**303.104-6 Restrictions on Government officials, employees, and consultants.**

(b) Procurement officials leaving the Department will be required to complete the certification set forth in Chapter 1-90 of the General Administration Manual if that official leaves the Department during the conduct of a procurement expected to result in a contract or modification in excess of \$100,000. The administrative officer will forward a copy of the certification to each responsible contracting officer for incorporation into the contract file.

**303.104-9 Certification requirements.**

(c) The contracting officer shall include the contracting officer certification in the contract file for each contract action over \$100,000. Including the certificate in the contract file shall be considered notification to the head of the agency.

(e)(2) The waiver shall be submitted to the Office of Acquisition and Grants Management in the Office of Management and Acquisition, Office of Management and Budget in the Office of the Secretary for review and approval before submission to the head of the agency.

**303.104-11 Processing violations or possible violations.**

(a)(1) The contracting officer determination that a reported violation or possible violation of the statutory prohibitions has no impact on the impending award or selection of a source must

be submitted through channels, along with supporting documentation, to the PORA for review and approval of the determination before award of a contract.

(2) The contracting officer's determination that a reported violation or possible violation of the statutory prohibitions has an impact on the pending award or selection of a source must be referred through channels, along with all related information available, to the PORA (if the PORA is an SES) or to another SES official designated by the OPDIV. That individual will—

(i) Refer the matter immediately to the Office of Acquisition and Grants Management in the Office of Management and Acquisition, Office of Management and Budget, Office of the Secretary for review, which office may consult with the Office of the General Counsel and the Office of the Inspector General, as appropriate; and

(ii) Determine the action to be taken on the procurement in accordance with FAR 3.104-11 (c) and (d).

(b) The individual in paragraph (a)(2) of this section acts as the agency head designee with respect to actions taken under the FAR clause at 52.203-10, Remedies for Illegal or Improper Activity.

#### **303.104-12 Ethics program training requirements.**

(a) The Office of Acquisition and Grants Management in the Office of Management and Acquisition (OAGM), Office of Management and Budget in the Office of the Secretary is responsible for developing a training module which can be used by the Department's OPDIVs and Regional offices to train procurement officials. Upon receipt of the module, each OPDIV and Regional Office must train the procurement officials set forth in 303.104-4(h)(1) before they can act as procurement officials.

(b) After the training has been completed, each procurement official must sign the "Procurement Official's Certificate of Procurement Integrity" before he/she can act as a procurement official on any procurement. The certificate shall be submitted to the servicing personnel office, where the certificate will be filed on the left side of the employee's Official Personnel Fold-

er. A copy of the certificate shall be provided to the contract office which shall maintain a list of the procurement officials who have signed the certificates.

(c) Procurement officials who serve multiple contracting offices (such as procurement lawyers) shall submit copies of their certificates to OAGM with the originals being transmitted to their servicing personnel office. OAGM shall maintain a list of such procurement officials and inform cognizant contracting officers upon telephonic request whether particular individuals are included on the list.

### **Subpart 303.2—Contractor Gratuities to Government Personnel**

#### **303.203 Reporting suspected violations of the Gratuities clause.**

Departmental personnel shall report suspected violations of the Gratuities clause in accordance with subpart M, Reporting Violations, of the Department's Standards of Conduct (45 CFR part 73) and General Administration Manual Chapter 5-10, rather than as specified in FAR 3.203. Refer to subpart E, Gifts, Entertainment, and Favors, of 45 CFR part 73 for an explanation regarding what is prohibited and what is permitted.

### **Subpart 303.3—Report of Suspected Antitrust Violations**

#### **303.303 Reporting suspected antitrust violations.**

A copy of each report of suspected antitrust violations submitted to the Attorney General shall also be submitted to the Director, Office of Acquisition and Grants Management.

[49 FR 13964, Apr. 9, 1984, as amended at 54 FR 24342, June 7, 1989]

### **Subpart 303.4—Contingent Fees**

#### **303.408 Evaluation of the SF 119.**

##### **303.408-1 Responsibilities.**

(b) The chief of the contracting office shall perform the review required by FAR 3.408-1(b) and should consult with the Office of General Counsel, Business

and Administrative Law Division, when deemed necessary.

**303.409 Misrepresentations or violations of the Covenant Against Contingent Fees.**

(a) Reports shall be made promptly to the contracting officer.

(b)(1)–(3) [Reserved]

(4) Suspected fraudulent or criminal matters to be reported to the Department of Justice shall be prepared in letter format and forwarded through acquisition channels to the head of the contracting activity for signature. The letter must contain all pertinent facts and background information considered by the contracting officer and chief of the contracting office that led to the decision that fraudulent or criminal matters may be present. A copy of the signed letter shall be sent to the Director, Office of Acquisition and Grants Management.

[49 FR 13964, Apr. 9, 1984, as amended at 54 FR 24342, June 7, 1989]

**Subpart 303.5—Other Improper Business Practices**

**303.502 Subcontractor kickbacks.**

(b) Any known or suspected violations of the Anti-Kickback Act (41 U.S.C. 51–54) shall be reported to the contracting officer who shall investigate the matter, document the findings, and report the results to the chief of the contracting office. If the results substantiate the known or suspected violation, the chief of the contracting office shall notify the Office of General Counsel, Business and Administrative Law Division and report the matter, through acquisition channels, to the head of the contracting activity. The head of the contracting activity shall take appropriate action in consonance with the Act, and notify the Director, Office of Acquisition and Grants Management of the case and its disposition.

[49 FR 13964, Apr. 9, 1984, as amended at 54 FR 24342, June 7, 1989]

**Subpart 303.6—Contracts With Government Employees or Organizations Owned or Controlled by Them**

**303.602 Exceptions.**

Approval of an exception to the policy stated in FAR 3.601 shall be made by the head of the OPDIV (Assistant Secretary for Management and Budget in OS cases) or the Regional Director.

**Subpart 303.7—Voiding and Rescinding Contracts**

**303.704 Policy.**

For the purposes of implementing FAR subpart 3.7, the authorities granted to the “agency head or designee” shall be exercised by the principal official responsible for acquisition.

[51 FR 44293, Dec. 9, 1986]

**PART 304—ADMINISTRATIVE MATTERS**

**Subpart 304.1—Contract Execution**

Sec.

304.101 Contracting officer’s signature.

304.170 [Reserved]

**Subpart 304.2—Contract Distribution**

304.201 Procedures.

**Subpart 304.6—Contract Reporting**

304.602 Federal Procurement Data System.

**Subpart 304.8—Contract Files**

304.801 General.

304.804 Closeout of contract files.

304.804–1 Closeout by the office administering the contract.

304.870 Closing review.

**Subpart 304.70—Acquisition Instrument Identification Numbering System**

304.7000 Scope of subpart.

304.7001 Numbering contracts.

304.7002 Numbering solicitation documents.

304.7003 Numbering purchase and delivery orders.

304.7004 Numbering basic agreements.

## **304.101**

304.7005 Numbering basic ordering agreements.

### **Subpart 304.71—Review and Approval of Proposed Contract Awards**

304.7100 Scope of subpart.

304.7101 Contracts requiring review and approval.

304.7102 Conduct of the review.

304.7103 Approvals.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 13965, Apr. 9, 1984, unless otherwise noted.

### **Subpart 304.1—Contract Execution**

#### **304.101 Contracting officer's signature.**

An original of each bilateral contract or modification shall be executed by the contractor and contracting officer. An original of each unilateral contract or modification shall be executed by the contracting officer. The contracting officer need only sign the original when carbon paper is used in sets of forms such as Standard Form 44 or Optional Form 347 or 348. A legible carbon impression of the contracting officer's signature shall carry the same force and effect as a pen and ink signature for unilateral contracts.

#### **§ 304.170 [Reserved]**

### **Subpart 304.2—Contract Distribution**

#### **304.201 Procedures.**

The signed original of bilateral contracts and modifications shall be placed in the contract file, and duplicate originals shall be furnished the contractor, the appropriate accounting point, the project officer, and other individuals or offices, as applicable. Purchase orders, delivery orders, and other unilateral contracts and modifications shall be distributed the same as bilateral contracts except the original shall be furnished the contractor or seller. Copies of unilateral contracts and modifications with carbon impressed signatures may be used but must be stamped "DUPLICATE ORIGINAL" (see 304.101).

[49 FR 36110, Sept. 14, 1984]

## **48 CFR Ch. 3 (10–1–97 Edition)**

### **Subpart 304.6—Contract Reporting**

#### **304.602 Federal Procurement Data System.**

The Department-wide Contract Information System (DCIS) represents the Department's implementation of the FPDS. All departmental contracting activities are required to participate in the DCIS and follow the procedures stated in the Contract Information System Manual and amendments to it. The principal official responsible for acquisition shall ensure that all required contract information is collected, submitted, and received into the DCIS on or before the 15th of each month for all appropriate contract and contract modification awards of the prior month.

[49 FR 13965, Apr. 9, 1984. Redesignated at 51 FR 44293, Dec. 9, 1986]

### **Subpart 304.8—Contract Files**

#### **304.801 General.**

OPDIVs shall prescribe the contents of contract files and establish filing procedures consistent with the nature of the contracting actions and in accordance with FAR 4.801, 4.802, and 4.803. Contract files should contain an index of the contents to facilitate review and should be separated into logical categories (see FAR 4.803).

#### **04.804 Closeout of contract files.**

##### **304.804-1 Closeout by the office administering the contract.**

(3) Files for all cost-reimbursement type contracts should be closed within 20 months of the month in which the contracting officer receives evidence of physical completion (see FAR 4.804-4). The contracting officer responsible for contract closeout may negotiate settlement of indirect costs for a specific contract, in advance of the determination of final indirect cost rates in accordance with FAR 42.708.

#### **304.870 Closing review.**

(a) Contracting officers shall assure the applicable items in FAR 4.804-5,

other than a field audit, have been accomplished prior to closing any physically completed contract. Cost-reimbursement type contracts will be subject to the additional requirements set forth below before they may be closed.

(b) Contracting officers shall use the instructions in the October 5, 1982 memorandum from the Deputy Assistant Secretary for Procurement, Assistance and Logistics to closeout cost-reimbursement type contracts physically completed prior to fiscal year 1977 and cost-reimbursement type contracts completed subsequent to that date for which field audit information is available.

(c) Contracting officers shall closeout all other cost-reimbursement type contracts physically completed after September 30, 1977 in accordance with the following procedures:

(1) Field audits will be conducted for contracts in excess of \$500,000 awarded to commercial organizations and non-profit organizations other than colleges and universities, hospitals and State and local units of government for which an agency other than HHS has audit cognizance. Field audits will also be conducted each year on approximately 25 of the same type contractors for which HHS has audit cognizance. These contracts may be closed after receipt of the field audit report.

(2) Contracts of any dollar value with non-proprietary colleges and universities, hospitals and State and local units of government and contracts not in excess of \$500,000 with other institutions/organizations shall be closed out on the basis of a desk audit. The desk audit should include (i) a confirmation from the project officer that labor, material, travel, and other types of direct costs are commensurate with contract requirements, (ii) a review of available audit reports to determine if any adjustments were made that may be applicable to the contract under review, and (iii) discussions with the cognizant government auditor when considered appropriate. These contracts shall be closed with the condition that they are subject to adjustment should an on-site audit be conducted at a later date and should unallowable costs be identified as a result of that audit. The release

executed by the contractor shall contain the following:

The Contractor agrees, pursuant to the clause in this contract entitled Allowable Cost (for cost-reimbursement contracts) or Allowable Cost and Fixed Fee (for CPFF contracts), that the amount of any sustained audit exceptions resulting from any audit made after final payment will be refunded to the Government.

(3) The contracting officer may request a field audit of any contract when, in his/her judgment, the risk attendant with the contract warrants it. The contracting officer, however, shall exercise discretion in requesting such audits on creditable evidence such as unsatisfactory dealings with the contractor during the period of contract performance, prior audit reports containing serious findings against the contractor, the known experience of other government officials in dealing with the contractor when the contracting officer is personally knowledgeable about the circumstances, formal third party complaints or allegations which bear upon the contractor's integrity or the propriety of costs charged to the Government, and other derogatory allegations or advice of a derogatory nature about the contractor made by responsible individuals which in the contracting officer's judgment should be investigated. Except where a contracting officer suspects misrepresentation or fraud, audits should not be requested if their cost of performance is likely to exceed their potential cost recovery.

(4) When an audit is warranted prior to closing out a contract, the contracting officer should request the audit directly from the Department of Health and Human Services Office of the Inspector General, Office of Audits (HHSOA). The request should cite the reasons the contracting officer believes an audit is warranted. A copy of the request should be forwarded to the Director, Office of Acquisition and Grants Management (DOAGM). In the event the Office of the Inspector General cannot honor the request in a reasonable period of time, it will consult with DOAGM and the contracting officer. The final decision on the need and scope of an audit will be made on the basis of the value of the contract, the

nature of the contracting officer's concerns, and the availability of HHSOA or other existing resources in the Department to perform a review to satisfy the contracting officer's concerns.

(5) Closeout procedures are to be followed in conjunction with the regular procedures now followed in administering contracts. These procedures are not meant or to be interpreted as imposing any requirement or responsibility on contracting officers or necessitating any reviews on the part of the contracting officials not currently required by the FAR. With some rare exceptions, Standard Form 1034, Public Voucher for Purchases and Services Other than Personal, will contain sufficient information to allow a contracting officer to satisfy requirements for desk audits. Accordingly, these closeout procedures shall not cause contracting officers to engage in extraordinary oversight or review and shall not be used by contracting officers as the basis for requiring contractors to submit extraordinary documentation such as payroll listing, labor billings, travel details, etc.

[49 FR 13965, Apr. 9, 1984, as amended at 54 FR 24342, June 7, 1989; 54 FR 43965, Oct. 30, 1989; 56 FR 47002, Sept. 17, 1991]

### Subpart 304.70—Acquisition Instrument Identification Numbering System

#### 304.7000 Scope of subpart.

This subpart prescribes policy and procedures for assigning identifying numbers to contracts and related instruments, including solicitation documents, purchase orders, and delivery orders.

#### 304.7001 Numbering contracts.

(a) *Contracts which require numbering.* The following contracts shall be numbered in accordance with the system prescribed in paragraph (b) of this section:

(1) All contracts, including letter contracts and task orders under basic ordering agreements, which involve the payment of \$2,500 or more for the acquisition of personal property or non-personal services.

(2) All contracts which involve the payment of \$2,000 or more for construction (including renovation or alteration).

(3) All contracts which involve more than one payment regardless of amount.

(The number assigned to a letter contract shall be assigned to the superseding definitized contract.)

(b) *Numbering system.* All contracts which require numbering shall be assigned a number consisting of the following:

(1) The three digit code assigned to the contracting office by the Office of Financial Operations, Office of Finance.

(2) A two digit fiscal year designation; and

(3) A four digit serial number. While it is required that a different series of four digit serial numbers be used for each fiscal year, serial numbers assigned need not be sequential.

(c) *Illustration of contract numbers.* The initial contract executed by the Division of Contract Operations, Office of the Secretary, for fiscal year 1983 should be numbered 100-83-0001, the second contract 100-83-0002. Alternatively, if it is desirable for internal identification purposes to establish separate series of numbers for sealed bid and negotiated contracts, this procedure is permissible. In this instance, the initial sealed bid contract might be numbered 100-83-0001 and the initial negotiated contract numbered 100-83-0500.

(d) *Assignment of identification codes.* Each contracting office of the Department shall be assigned a three digit identification code by the Office of Financial Operations. Requests for the assignment of such codes for newly established contracting offices shall be submitted by the headquarters acquisition staff office of the contracting activity to the Director, Office of Financial Operations. Conversely, in the event that a contracting office is to be disestablished, the Director, Office of Financial Operations shall be notified.

A listing of the contracting office identification codes currently in use is contained in the Department-wide Contract Information System Manual (DCIS).

[49 FR 13961, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 54 FR 24342, June 7, 1989]

#### **304.7002 Numbering solicitation documents.**

Requests for proposals and invitations for bids shall be numbered in accordance with procedures prescribed by the headquarters staff office of the contracting activity.

#### **304.7003 Numbering purchase and delivery orders.**

Contracting offices shall establish procedures for numbering purchase orders as required for effective identification and control.

#### **304.7004 Numbering basic agreements.**

Basic agreements shall be numbered in accordance with procedures prescribed by the headquarters staff office of the cognizant contracting activity. However, individual contracts entered into pursuant to the terms and conditions of a basic agreement shall be numbered in accordance with 304.7001(b).

#### **304.7005 Numbering basic ordering agreements.**

Basic ordering agreements shall be numbered in accordance with procedures prescribed by the headquarters staff office of the contracting activity.

[49 FR 13965, Apr. 9, 1984, as amended at 53 FR 15563, May 2, 1988]

### **Subpart 304.71—Review and Approval of Proposed Contract Awards**

#### **304.7100 Scope of subpart.**

This subpart prescribes review and approval procedures for contract actions to ensure that:

(a) Contract awards are in conformance with law, established policies and procedures, and sound business practices;

(b) Contractual documents properly reflect the mutual understanding of the parties; and

(c) The contracting officer is informed of deficiencies and items of questionable acceptability and corrective action is taken.

#### **304.7101 Contracts requiring review and approval.**

(a) *General.* All contractual documents, regardless of dollar value, are to be reviewed by the contracting officer prior to award, even if the review and approval procedures prescribed in this section are applicable. However, under no circumstances may the individual who signs a contract instrument as contracting officer perform final review and approval of that contract action if it, or any modification to it, is expected to exceed the levels set forth in (b) (1) or (2) below.

(b) *Required reviews and approvals.* (1) Officials responsible for the acquisition function in the Office of the Secretary, OPDIVs (except the Public Health Service), and regional offices are to assure that sealed bid or negotiated contracts, and/or modifications to them, expected to exceed \$300,000, are reviewed and approved prior to award. In order to assure the propriety of smaller dollar acquisitions, a statistically significant sample of contract actions not expected to exceed \$300,000 are to be reviewed and approved prior to award.

(2) Contract actions of the Public Health Service are to be reviewed and approved prior to award in accordance with the dollar thresholds stated in Subpart PHS 304.71. In order to assure the propriety of smaller dollar acquisitions, a statistically significant sample of contract actions not expected to exceed those dollar thresholds referenced in Subpart PHS 304.71 are to be reviewed and approved prior to award.

(c) *Reviewing officials.* Officials assigned responsibility for review and approval of contract actions must possess qualifications in the field of acquisition commensurate with the level of review performed, and, as a minimum, possess those acquisition skills expected of a contracting officer. The following officials are responsible for preaward contract review and approval:

Office of the Secretary—

Director, Division of Contract and Grant Operations  
 Director, Division of Contract Operations,  
 Office of Administrative and Management Services  
 Office of Human Development Services—Director,  
 Grants and Contracts Management Division  
 Social Security Administration—Director,  
 Office of Acquisition and Grants (may be  
 redelegated to the appropriate division di-  
 rection within the Office of Acquisition  
 and Grants)  
 Health Care Financing Administration—Di-  
 rector, Division of Procurement Services.  
 Public Health Service—The reviewing offi-  
 cial is designated in Subpart PHS 304.71, as  
 approved by the Director, Office of Pro-  
 curement and Logistics Policy, OPAL.

However, if any of the officials are to serve as the contracting officer and sign the contractual document, the review and approval function shall be performed by an appropriate official at least one level above.

(d) *Regional offices.* The Director, Regional Administrative Support Center (RASC) is responsible for review and approval of contracts, or modifications to them, expected to exceed \$300,000 and executed by the regional office's contracting staff. The RASC may obtain the advice of the Regional Attorney in the review of proposed contract awards.

[49 FR 13961, Apr. 9, 1984, as amended at 50 FR 23127, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 51 FR 44293, Dec. 9, 1986; 52 FR 27558, July 22, 1987; 54 FR 24343, June 7, 1989]

### 304.7102 Conduct of the review.

(a) *General.* Reviewing officials may solicit the participation of specialists in various technical and administrative disciplines to aid in the review. The method of the review is not prescribed here in order to permit discretionary judgment in determining the depth to which significant areas are to be examined.

(b) *Contract file.* The reviewer is to:  
 (1) Determine that the contract file constitutes an independent record, documented to provide a complete chronology of actions related to all aspects of the acquisition, and that the documentation is consistent with the requirements of FAR 4.803;

(2) Determine that each contract file contains documentation or other data (i.e., technical and business manage-

ment evaluation, cost advisory and audit reports, negotiation memorandum, etc.) sufficient to explain and support the rationales, judgments, and authorities upon which all decisions and actions were predicated; and

(3) Ascertain:

(i) If the proposed acquisition action is to be awarded by other than full and open competition, that the documentation and approvals supporting the decision are present in the contract file;

(ii) That proper publicizing of the proposed acquisition was made pursuant to FAR Part 5;

(iii) That approval was obtained for any deviation from prescribed contract clauses;

(iv) That sufficient competition was obtained, the competitive range was appropriately determined, and oral or written discussions were conducted with all firms in the competitive range;

(v) That all the rules set forth in FAR Part 14 were complied with when the proposed award is a result of an IFB; and

(vi) That appropriate determinations and findings which justify the type of contract and advance payments are a part of the contract file.

[49 FR 13961, Apr. 9, 1984, as amended at 50 FR 23127, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

### 304.7103 Approvals.

(a) Awards are not to be made until approval is granted by the reviewing official identified in 304.7101. All approvals are to be in writing, except that when time is of the essence approval may be given orally and subsequently confirmed in writing.

(b) The reviewing official shall not approve a proposed contract award if a substantive issue (or issues) remains to be resolved. However, in appropriate circumstances, the reviewing official may use discretion and grant approval on a conditional basis and require the contracting officer to submit follow-up written documentation that the substantive issue has been resolved. This provides the reviewing official the option to require the contracting officer to resolve the substantive issue and submit documenting evidence before award approval is given, or to grant

**Department of Health and Human Services**

**304.7103**

conditional approval providing the substantive issue is resolved before the contract is awarded and require the contracting officer to submit documenting evidence either before or after the award. The reviewing official also has the option to determine the extent

of documentation evidence to be submitted by the contracting officer. This may range from complete resubmission of the contract file to submission of a memorandum stating the contracting officer's actions in resolving the substantive issue.

## SUBCHAPTER B—ACQUISITION PLANNING

### PART 305—PUBLICIZING CONTRACT ACTIONS

#### Subpart 305.1—Dissemination of Information

Sec.

305.102 [Reserved]

#### Subpart 305.2—Synopsis of Proposed Contract Actions

305.202 Exceptions.

#### Subpart 305.3—Synopsis of Contract Awards

305.303 Announcement of contract awards.

#### Subpart 305.5—Paid Advertisements

305.502 Authority.

305.503 Procedures.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 13969, Apr. 9, 1984, unless otherwise noted.

#### Subpart 305.1—Dissemination of Information

**§ 305.102 [Reserved]**

#### Subpart 305.2—Synopsis of Proposed Contract Actions

##### **305.202 Exceptions.**

(b) When a contracting office believes that it has a situation where advance notice is not appropriate or reasonable, it shall prepare a memorandum citing all pertinent facts and details and send it, through normal acquisition channels, to the Director, Office of Acquisition and Grants Management (DOAGM) requesting relief from synopsisizing. The DOAGM shall review the request and decide whether an exception to synopsisizing is appropriate or reasonable. If it is, the DOAGM shall take the necessary coordinating actions required by FAR 5.202(b). Whatever the decision is on the request, the DOAGM shall promptly notify the contracting office when a determination has been made.

[51 FR 44293, Dec. 9, 1986, as amended at 54 FR 24343, June 7, 1989]

### Subpart 305.3—Synopsis of Contract Awards

#### **305.303 Announcement of contract awards.**

(a) *Public announcement.* Any contract, contract modification, or delivery order in the amount of \$1 million or more shall be reported by the contracting officer to the Office of the Deputy Assistant Secretary for Legislation (Congressional Liaison), Room 406G, Hubert H. Humphrey Building. Notification shall be accomplished by providing a copy of the contract or award document face page to the referenced office prior to the day of award, or in sufficient time to allow for an announcement to be made by 5 p.m. Washington, DC time on the day of award.

[53 FR 43207, Oct. 26, 1988, as amended at 57 FR 11689, April 7, 1992]

#### Subpart 305.5—Paid Advertisements

##### **305.502 Authority.**

The contracting officer is authorized to publish advertisements, notices, and contract proposals in newspapers and periodicals in accordance with the requirements and conditions referenced in FAR Subpart 5.5.

##### **305.503 Procedures.**

Requests for acquisition of advertising shall be accompanied by written authority to advertise or publish which sets forth justification and includes the names of newspapers or journals concerned, frequency and dates of proposed advertisements, estimated cost, and other pertinent information. Paid advertisements shall be limited to the publication of essential details of grant announcements, invitations for bids, and requests for proposals, including those for the sale of personal property, and for the recruitment of employees.

**PART 306—COMPETITION  
REQUIREMENTS**

**Subpart 306.2—Full and Open Competition  
After Exclusion of Sources**

Sec.

306.202 Establishing or maintaining alternative sources.

**Subpart 306.3—Other Than Full and Open  
Competition**

306.302 Circumstances permitting other than full and open competition.

306.302-1 Only one responsible source and no other supplies or services will satisfy agency requirements.

306.302-7 Public interest.

306.303 Justifications.

306.303-1 Requirements.

306.303-2 Content.

306.304 Approval of the justification.

**Subpart 306.4—Sealed Bidding and  
Competitive Proposals**

306.401 Sealed bidding and competitive proposals.

**Subpart 306.5—Competition Advocates**

306.501 Requirement.

306.502 Duties and responsibilities.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 50 FR 23127, May 31, 1985, unless otherwise noted.

**Subpart 306.2—Full and Open  
Competition After Exclusion of  
Sources**

**306.202 Establishing or maintaining  
alternative sources.**

(a) The reference to the agency head in FAR 6.202(a) shall mean the appropriate competition advocate cited in 306.501.

(b)(1) The required determination and findings (D&F) shall be prepared by the contracting officer based on the data provided by program personnel, and shall be signed by the appropriate competition advocate. The D&F signatory authority is not delegable.

[50 FR 23127, May 31, 1985, and 50 FR 38004, Sept. 19, 1985, as amended at 51 FR 44293, Dec. 9, 1986]

**Subpart 306.3—Other Than Full  
and Open Competition**

**306.302 Circumstances permitting  
other than full and open competi-  
tion.**

**306.302-1 Only one responsible source  
and no other supplies or services  
will satisfy agency requirements.**

(a) *Authority.* (2)(ii) Follow-on contracts for the continuation of major research and development studies on long-term social and health programs, major research studies, or clinical trials may be deemed to be available only from the original source when it is likely that award to any other source would result in unacceptable delays in fulfilling the Department's or OPDIV's requirements.

(b) *Application.* (4) When the OPDIV head has determined that a specific item of technical equipment or parts must be obtained to meet an activity's program responsibility to test and evaluate certain kinds and types of products, and only one source is available. (This criterion is limited to testing and evaluation purposes only and may not be used for initial outfitting or repetitive acquisitions. Project officers should support the use of this criterion with citations from their agency's legislation and the technical rationale for the item of equipment required.)

(c) *Application for brand name descriptions.* There is existing equipment which, for reasons of compatibility and interchangeability, requires an item which is manufactured only by one source. (This criterion is for use in acquisitions where a particular brand name item is required, and an "or equal" will not meet the Government's requirements. This criterion may not be used when there are other manufacturers available which may be able to produce acceptable items even though their products might require some adjustments and modifications. These other manufacturers must be given the opportunity to compete.)

[50 FR 23127, May 31, 1985, and 50 FR 38004, Sept. 19, 1985, as amended at 51 FR 44293, Dec. 9, 1986; 57 FR 11689, Apr. 7, 1992]

**306.302-7 Public interest.**

(a) *Authority.* (2) Agency head, in this instance, means the Secretary.

(c) *Limitations.* When using the authority cited in FAR 6.302-7(a)(1), the Secretary's approval must be obtained. Therefore, an "approval package" must be prepared and staffed through departmental acquisition channels to the Secretary. The package shall include:

(1) A determination and findings, prepared by the contracting officer, for the Secretary to sign.

(2) A letter for the Secretary to sign notifying Congress of the determination to award a contract under the authority of 41 U.S.C. 253(c)(7). This letter must be received by Congress at least 30 days before contract award.

(3) A "Justification for Other than Full and Open Competition" (JOFOC).

(4) A briefing paper presenting background, need, etc.

(5) Any other pertinent papers or documents required by the Department.

**306.303 Justifications.****306.303-1 Requirements.**

(b) Preliminary arrangements or agreements with the proposed contractor made by someone other than the contracting officer shall have no effect on the rationale used to support an acquisition for other than full and open competition.

(f) The program office should discuss prospective other than full and open competition requests with their supporting contracting office as early as possible during the acquisition planning stage (see FAR Subpart 7.1 and Subpart 307.1), and before submitting the requisition or request for contract. The discussions may resolve uncertainties, provide program offices with names of other sources, allow proper scheduling of the acquisition, and avoid delays which might otherwise occur should it be determined that the request for other than full and open competition is not justified.

(g) When a program office desires to obtain certain goods or services by contract without full and open competition, it shall, at the time of forwarding the requisition or request for contract, furnish the contracting office a justification explaining why full and open

competition is not feasible. All justifications shall be initially reviewed by the contracting officer.

(1) Justifications in excess of the small purchase limitation shall be in the form of a separate, self-contained document, prepared in accordance with FAR 6.303 and 306.303, and called a "JOFOC" (Justification for Other than Full and Open Competition). Justifications of \$25,000 or less may be in the form of a paragraph or paragraphs contained in the requisition or request for contract.

(2) Justifications, whether over or under the small purchase limitation, shall fully describe what is to be acquired, offer reasons which go beyond inconvenience, and explain why it is not feasible to obtain competition. The justifications shall be supported by verifiable facts rather than mere opinions. Documentation in the justifications should be sufficient to permit an individual with technical competence in the area to follow the rationale.

[50 FR 23127, May 31, 1985, as amended at 57 FR 11689, Apr. 7, 1992]

**306.303-2 Content.**

(a)(1) The program office and name, address, and telephone number of the project officer shall also be included.

(2) This item shall include project identification such as the authorizing program legislation, to include citations or other internal program identification data such as title, contract number, etc.

(3) A full description of the requirement and its dollar amount is to be included. It may be in the form of a statement of work, purchase description, or specification. A statement is to be included to explain whether the acquisition is an entity in itself, whether it is one in a series, or part of a related group of acquisitions.

(c) Each JOFOC shall conclude with at least the following signatory lines (other concurrence lines may be added as deemed necessary by the contracting activity):

Recommended, Project Officer \_\_\_\_\_  
Date \_\_\_\_\_  
Concur, Project Officer's Immediate Supervisor \_\_\_\_\_  
Date \_\_\_\_\_  
Concur, Contracting Officer \_\_\_\_\_

Date \_\_\_\_\_  
 Approved, Approving Official \_\_\_\_\_  
 Date \_\_\_\_\_

### **306.304 Approval of the justification.**

(a)(1) For purchases in excess of 10 percent of the small purchase limitation but not over the small purchase limitation, the contracting officer is authorized to review and approve (or disapprove) the justification (see 313.106(c)(2)). For acquisitions over the small purchase limitation, but not exceeding \$100,000, the JOFOC shall be submitted to the contracting officer for review. The contracting officer will either concur or nonconcur, and forward the JOFOC to the principal official responsible for acquisition for approval. (When the contracting officer and principal official responsible for acquisition are the same individual, the approval will be made by the respective official listed in 306.501.) The principal official responsible for acquisition may redelegate approval for acquisitions between the small purchase limitation and \$50,000 to the chief of the contracting office, provided that individual is at least one level above the contracting officer who will sign the contract.

(2) The competition advocates are listed in 306.501.

(3) The following shall serve as the approving officials referenced in FAR 6.304(a)(3):

HCFA—Administrator for Health Care Financing  
 OHDS—Assistant Secretary for Human Development Services  
 OS—Assistant Secretary for Management and Budget  
 PHS—Assistant Secretary for Health (may be delegated to the Deputy Assistant Secretary for Health Operations)  
 SSA—Commissioner of Social Security  
 RO's—Regional Director

This authority is not delegable, except as indicated for PHS.

(4) The senior procurement executive of the Department is the Assistant Secretary for Management and Budget.

(c) A class justification shall be processed the same as an individual justification.

(d) The contracting officer who receives a JOFOC for processing shall, after ascertaining that the document is complete, request advice from pricing, audit, legal, and other appropriate staff

offices, and forward the JOFOC with his or her concurrence or nonconcurrence, to the appropriate approving official. When the contracting officer does not concur with the JOFOC, a written explanation setting forth the reasons must be provided the approving official. If the JOFOC is disapproved by the approving official, the contracting officer shall promptly notify the concerned program office.

(e) It is the responsibility of the approving official to determine whether a contract may properly be awarded without full and open competition. The program office and project officer are responsible for furnishing the contracting officer and approving official with pertinent supporting information necessary to make such determinations. Other staff offices shall advise the contracting officer and approving official as requested.

(f) As each justification is reviewed, the approving official should ask: why the acquisition cannot be competed, are there sufficient grounds for excluding all other actual or potential sources, what actions can be taken to obtain full and open competition in the instant acquisition, and what actions are needed to avoid the need for a subsequent or continuing acquisition that is for other than full and open competition?

[50 FR 23127, May 31, 1985, as amended at 56 FR 47002, Sept. 17, 1991]

## **Subpart 306.4—Sealed Bidding and Competitive Proposals**

### **306.401 Sealed bidding and competitive proposals.**

The requirement in FAR 6.401 to document the reasons sealed bidding is not appropriate may be accomplished by adding a sentence to the negotiation memorandum (see 315.672) specifying which criterion (or criteria) listed in FAR 6.401(a) is (are) not applicable to the acquisition.

## **Subpart 306.5—Competition Advocates**

### **306.501 Requirement.**

The Department's competition advocate is the Deputy Assistant Secretary

## 306.502

for Management and Acquisition. The competition advocates for the Department's primary contracting offices are as follows:

HCFA—Associate Administrator for Management and Support Services  
OHDS—Director, Office of Management Services  
OS—Director, Office of Acquisition and Grants Management  
OASH—Director, Administrative Services Center  
ADAMHA—Associate Administrator for Management  
AHCPR—Executive Officer, Agency for Health Care Policy and Research  
CDC—Director, Office of Program Support  
FDA—Associate Commissioner for Management and Operations  
HRSA—Associate Administrator for Operations and Management  
IHS—Associate Director, Office of Administration and Management  
NIH—(R&D)—Associate Director for Extramural Affairs (Other than R&D)—Associate Director for Intramural Affairs  
SSA—Deputy Commissioner for Management.  
RO's—Director, Regional Administrative Support Center

[50 FR 23127, May 31, 1985, and 50 FR 38004, Sept. 19, 1985, as amended at 52 FR 27558, July 22, 1987; 53 FR 15563, May 2, 1988; 53 FR 43207, Oct. 26, 1988; 54 FR 24343, June 7, 1989; 55 FR 42197, Oct. 18, 1990]

### 306.502 Duties and responsibilities.

(b) The competition advocates listed in 306.501 shall assist the Department's competition advocate, when requested, by providing data and reports to aid in the accomplishment of the duties required of the Department's competition advocate as stated in FAR 6.502(a).

[50 FR 23127, May 31, 1985, as amended at 50 FR 38004, Sept. 19, 1985]

## PART 307—ACQUISITION PLANNING

### Subpart 307.1—Acquisition Plans

Sec.

- 307.104 General procedures.
- 307.104-1 Requirement for acquisition planning.
- 307.104-2 Responsibilities for acquisition planning.
- 307.104-3 Preparation of acquisition plan.
- 307.105 Contents of written acquisition plans.
- 307.105-1 Format and content.
- 307.105-2 Special program clearances or ap-

## 48 CFR Ch. 3 (10-1-97 Edition)

provals.

- 307.105-3 Specification, purchase description, and statement of work.
- 307.170 Program training requirements.
- 307.170-1 Policy exceptions.
- 307.170-2 Training course prerequisites.

### Subpart 307.3—Contractor Versus Government Performance

- 307.302 General.
- 307.303 Determining availability of private commercial sources.
- 307.304 Procedures.
- 307.307 Appeals.

### Subpart 307.70—Considerations in Selecting an Award Instrument

- 307.7000 Scope of subpart.
- 307.7001 Applicability.
- 307.7002 Purpose.
- 307.7003 Distinction between acquisition and assistance.
- 307.7004 Procedures.

### Subpart 307.71—Phase II Advance Acquisition Planning (Scheduling)

- 307.7101 Background.
- 307.7102 Accountability and responsibility.
- 307.7103 Purpose.
- 307.7104 Contracting activity actions.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 13969, Apr. 9, 1984, unless otherwise noted.

## Subpart 307.1—Acquisition Plans

### 307.104 General procedures.

(a) The acquisition planning document is an administrative tool designed to enable the contracting officer and project officer to plan effectively for the accomplishment of an acquisition during a specified time frame. The acquisition planning document serves as an outline of the method by which the contracting officer expects to accomplish the acquisition task.

(c) If the plan proposes using other than full and open competition, the plan shall also be coordinated with the Chief of the contracting office, acting for the competition advocate.

[49 FR 13969, Apr. 9, 1984, as amended at 50 FR 23129, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 51 FR 44293, Dec. 9, 1986]

**307.104-1 Requirement for acquisition planning.**

(a) The acquisition planning document is required for all new negotiated acquisitions which are expected to exceed \$100,000, except the following:

(1) Acquisition of architect-engineer services;

(2) Acquisitions of utility services where the services are available from only one source; and

(3) Acquisitions made from or through other Government agencies.

(b) An acquisition planning document is also required for all two-step sealed bid acquisitions expected to exceed \$100,000.

(c) The principal official responsible for acquisition shall prescribe acquisition planning procedures for:

(1) Negotiated acquisitions which are not expected to exceed \$100,000;

(2) Two-step sealed bid acquisitions which are not expected to exceed \$100,000; and

(3) All other sealed bid acquisitions regardless of dollar amount.

(d) An acquisition planning document is not required for a contract modification which either exercises an option or adds funds to an incrementally funded contract, provided there is an approved acquisition planning document in accordance with 307.105 and there is no significant deviation from that plan.

[49 FR 13969, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

**307.104-2 Responsibilities for acquisition planning.**

(a) *Planning by program and staff activities.* Whenever execution of a program or project requires the acquisition of property or services by contract, the program or project plan shall delineate all elements to be acquired by contract. The program or project plans must include a plan and time-frame for completion action.

(b) *Planning for acquisition actions.* Action should commence as early as possible to effect an orderly and balanced acquisition workload throughout a fiscal year. Project officers who expect to initiate acquisitions are required to discuss their requirements with the contracting officials who will

be responsible for these acquisitions to compare current staff capabilities with anticipated requirements to achieve an even distribution of fiscal year workload consistent with program needs. These discussions should result in understandings on:

(1) The details of the acquisition plan;

(2) Schedule for the completion of the acquisition plan;

(3) Preliminary discussions on the work statement/specifications and appropriate evaluation criteria; and

(4) Preliminary discussions on the content and timing of the request for contract (RFC).

(c) *Planning by contracting activities.* Contracting activities are required to coordinate with program and staff offices to ensure:

(1) Timely and comprehensive planning for acquisitions;

(2) Timely initiation of requests for contracts; and

(3) Instruction of program and staff offices in proper acquisition practices and methods.

**307.104-3 Preparation of acquisition plan.**

(a) The acquisition planning document serves as an advance agreement between program and contracting personnel by outlining the methods of how and when the acquisition is to be accomplished. It serves to resolve problems early in the acquisition cycle thereby precluding delays in contract placement. It is developed prior to the preparation and submission of the formal request for contract to the contracting activity. (For detailed information concerning the request for contract, see Subpart 315.70.)

(b) The acquisition planning document shall be prepared jointly by the project officer and the contract negotiator or in accordance with procedures prescribed by the principal official responsible for acquisition.

**307.105 Contents of written acquisition plans.****307.105-1 Format and content.**

The Department does not prescribe a standard format for the acquisition planning document, but recommends the use of a format similar to what is

provided in this section. The subject areas addressed in paragraphs (a) through (e) must be included in every acquisition planning document. An OPDIV, agency, or regional office contracting activity may prescribe a standard format for the acquisition planning document and may include additional subject areas that are pertinent to that activity's needs.

(a) *Identification information.* The contracting activity shall prescribe the information necessary for readily identifying a planned acquisition. The information may include items such as acquisition planning document number, request for contract number, public law, program or project officer, etc.

(b) *Programmatic considerations.* (1) *Description of the project/supplies/services.* Include a brief description of the proposed project/supplies/services. Discuss all anticipated future requirements related to the acquisition. Discuss any past, present or future inter-related projects.

(2) *Project funding.* Include the summary of funds expected to be obligated for the entire project by fiscal years and phases. Include expenditures for previous years. Discuss the probability of obtaining future years funding and/or what specific managerial action can be taken to insure future funding (if applicable).

(3) *Background and acquisition history.* Provide a brief factual summary of the technical and contractual history of the supplies/services being acquired.

(4) *Related projects, efforts undertaken to avoid duplication of effort.* Discuss efforts made to determine if existing projects, supplies or materials will satisfy the requirement. Include any related in-house efforts, searches, and clearinghouse reviews made to avoid duplication of effort.

(5) *Need for project/supplies/services.* Discuss rationale for deciding on the need for the project/supplies/services.

(6) *Special program clearances or approvals.* Review 307.105-2 to determine which special program clearances or approvals are required. Specify clearances or approvals applicable to this acquisition.

(7) *Phasing.* Briefly describe discrete tasks or stages of accomplishment which could be susceptible to phasing.

Describe criteria for evaluation of performance of each phase before proceeding to the next. (See 307.105-3(c)(3) for a discussion on phasing.)

(8) *Government furnished material/facilities.* Indicate material and facilities that will be furnished to the contractor and any associated problems which may be encountered. Discuss possible inequities which may arise in furnishing the materials or facilities. Discuss screening efforts for availability through GSA excess property schedules.

(9) *Discussion of project risk.* Provide a discussion of major areas of project risk including technical, cost, and schedule risk. Describe what efforts are planned to reduce risk. If an acquisition, which is planned to be awarded using other than full and open competition represents a significant portion of a proposed contractor's business, discuss the impact on technical capability, realism of schedule, changes in contractor workload and related cost impact.

(10) *Reporting/delivery requirements.* Describe the basis for establishing the delivery/reporting requirements and include the anticipated deliverables and time(s) for delivery.

(11) *Replication, dissemination, or use of the results.* Discuss anticipated replication, dissemination, or use of the results. Describe user audience and their expected use. Include a description of the delivery system.

(12) *Data, data rights, patents, copyrights.* Discuss data to be developed. Specify data to be delivered and data to remain in the contractor's possession. Discuss how the data is to be used, maintained, disclosed and disposed of by the contractor. Discuss data subject to the Privacy Act or Confidentiality of Information clause. Discuss data to be delivered with limited rights, data where title would not vest in the Government, and anticipated copyrights or patents. Discuss whether or not the data will permit any follow-on acquisitions to be competitive.

(13) *Post-award administration and monitoring.* Detail milestones that require periodic evaluation of the contractor's progress. Discuss any formal management systems to be used to monitor the contractor. Discuss plans

for post-award conference and site visits. Delineate the timing of the periodic status reports.

(14) *Technical evaluation plans.* Discuss the plans for technical evaluation of the proposal. Discuss whether non-Federal technical evaluators will review the proposals. Discuss potential conflict of interest situations.

(c) *Acquisition approach.* (1) *Proposed sources.* Include sources or categories of sources (if apparent). Address the pertinent areas stated in FAR 7.105(b)(2).

(2) *Contract type.* Provide the rationale for recommendation of contract type.

(3) *Socioeconomic programs.* Discuss preliminary liaison with the Small and Disadvantaged Business Utilization Specialist for review to determine requirements susceptible for the various socioeconomic acquisition programs; i.e., small business, disadvantaged business, or labor surplus area set-asides.

(4) *Other considerations, as applicable.* Discuss special contract clauses and proposed HHSAR deviations, if required. Discuss circumstances such as the effect of a protest on a previous acquisition to this acquisition, special public law or regulatory requirements which place restrictions on this acquisition, and use of a special type of synopsis. Address planned preproposal conference, preaward survey and preaward site visits.

(d) *Planning for the acquisition cycle.*

(1) *Scheduling considerations.* The project officer and the contract negotiator shall establish realistic planned dates which meet the program needs for award to assure timely delivery or completion of the project. The following factors should be considered in planning realistic dates:

(i) Individual project officer and contract negotiator workloads;

(ii) Planned, extended absences from the office; and

(iii) Schedules are in consonance with established office goals for overall orderly and balanced workloads.

(2) *Acquisition planning schedule.* The following acquisition planning schedule should be included in all plans to the extent the items are significant or appropriate to the acquisition. Addi-

tional items may be added as appropriate.

#### ACQUISITION PLANNING SCHEDULE

##### *Actions and Date*

Advance or sources sought synopsis released  
Advance or sources sought synopsis closed  
Synopsis evaluation received  
Request for contract received  
Special program approvals received  
Synopsis publicizing proposed acquisition released  
Request for proposal released  
Preproposal conference conducted  
Proposals received  
Technical evaluation received  
Cost advisory or audit report received  
Equal opportunity clearance obtained  
Prenegotiation conference conducted  
Negotiation completed  
Contract document prepared  
Contract approval completed  
Contract released  
Award

(e) *Approvals.* All acquisition planning documents shall be signed by the project officer and the contract negotiator. Acquisition planning documents for acquisitions estimated to be between \$100,000 and \$1,000,000 shall be approved by the contracting officer. Acquisition planning documents for acquisitions estimated to be in excess of \$1 million shall be approved by the principal official responsible for acquisition or his/her designee. The designated official shall be in a position no lower than the level above the contracting officer. One copy of all acquisition planning documents shall be filed with the principal official responsible for acquisition or the designated official for planning purposes. The original acquisition planning document shall be retained in the contract file.

[49 FR 13969, Apr. 9, 1984, as amended at 50 FR 23129, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

#### **307.105-2 Special program clearances or approvals.**

The following special program clearances or approvals should be reviewed for applicability to each planned acquisition. The ones which are applicable should be addressed in the acquisition planning document and immediate programmatic action should be initiated to obtain the necessary clearances or approvals.

(a) *Clearances or approvals required to be completed and submitted with the request for contract (RFC).*—(1) *Automatic data processing.* All proposed acquisitions of automatic data processing hardware, software packages, and services, as well as telecommunications equipment, which exceed the dollar thresholds stated in Chapter 4-10 of the HHS Information Resources Management (IRM) Manual, must be reviewed and approved by the Office of Information Resources Management (OIRM), OASMB-0S. (See HHS Information Resources Management (IRM) Manual, Chapter 4-10; Title 41 CFR Chapter 201; and Subpart 339.70.)

(2) *ADP systems security.* All ADP systems regardless of dollar amount are required to have a Certification of ADP Systems Security Adequacy signed by the ADP system manager and the cognizant ADP systems security officer. (See HHS IRM Manual, Part 6—ADP Systems Security; OMB Circular No. A-71, Transmittal Memorandum No. 1; and Subpart 339.70.)

(3) *Advisory and assistance services.* OPDIV and STAFFDIV heads and regional directors are responsible for review and approval of all proposed advisory and assistance services contracts and purchase orders. (See General Administration Manual Chapter 8-15.)

(4) *Evaluation contracts.* The Assistant Secretary for Planning and Evaluation (ASPE) must approve all evaluation projects for proposed solicitations, except those which have been included in research, demonstration, or evaluation plans previously approved by the ASPE.

(5) *Commercial activities.* (OMB Circular No. A-76) A request for contract (RFC) must contain a statement as to whether the proposed solicitation is or is not to be used as part of an OMB Circular No. A-76 cost comparison. (See General Administrative Manual (GAM) Chapter 18-10; FAR Subpart 7.3, Subpart 307.3; OMB Circular No. A-76.)

(6) *Paid advertising.* Paid advertisements, notices or contract proposals to be published in newspapers and periodicals may be authorized by the contracting officer. (See FAR Subpart 5.5, Subpart 305.5; Title 7, Chapter 5-25.2, and the General Accounting Office Pol-

icy and Procedures Manual for Guidance of Federal Agencies.)

(7) *Printing.* The acquisition of printing by contract is prohibited unless it is authorized by the Joint Committee on Printing of the U.S. Congress. Procedures to be followed are contained in the "Government Printing and Binding Regulations" and the HHS Printing Management Manual and FAR Subpart 8.8.

(8) *Fraud, abuse and waste.* All proposed acquisitions that concern the subjects of fraud, abuse and waste must be reviewed and approved by the Inspector General or Deputy Inspector General, and written approval from either must be included in the request for contract.

(9) *Paperwork Reduction Act.* Under the Paperwork Reduction Act of 1980 (Pub. L. 96-511), a Federal agency shall not collect information or sponsor the collection of information from ten or more persons (other than Federal employees acting within the scope of their employment) unless, in advance, the agency has submitted Standard Form 83, Request for OMB Review, to the Director of the Office of Management and Budget, and the Director has approved the proposed collection of information. Procedures for the approval may be obtained by contacting the OPDIV reports clearance officer. (See Title 5 CFR Part 1320 and General Administration Manual Chapter 10-20.)

(10) *Contracts with federal employees.* Contracts between the Government and Government employees or between the Government and organizations which are substantially owned or controlled by Government employees may not knowingly be entered into, except for the most compelling reasons (see FAR Subpart 3.6). Authority to enter into a contract with a Government employee or an organization substantially owned or controlled by a Government employee must be approved prior to award of the contract by either the Assistant Secretary for Management and Budget, the head of the OPDIV, or the regional director, or their designees. (See 45 CFR Part 73 and HHS Standards of Conduct.)

(11) *Publications.* All projects which will result in contracts and which include publications require review and

approval by the Office of the Assistant Secretary for Public Affairs (OASPA). Form HHS-615, Publication Planning and Clearance Request, should be forwarded to OASPA through the OPDIV public affairs officer. Publications are defined in the chapter on publications in the Public Affairs Management Manual.

(12) *Public affairs services.* Projects for the acquisition of public affairs services in excess of \$5,000 shall be submitted to the Office of the Assistant Secretary for Public Affairs (OASPA) for review and approval on Form HHS-524, Request for Public Affairs Service Contract.

(13) *Audiovisual (videotape and motion picture production).* Any proposed acquisition of an audiovisual production requires the submission of a Standard Form 282, Mandatory Title Check, to the National Audiovisual Center (NAC). When the results of this title check have been reviewed by the project office and if a determination is made that existing materials are not adequate to fulfill the requirement, a statement to that effect shall be prepared by the project office. For acquisitions in excess of \$5,000, a copy of that statement, together with a Standard Form 202, Federal Audiovisual Production Report, and Form HHS-524A, Request for Audiovisual Material, shall be submitted through the OPDIV public affairs officer to the Office of the Assistant Secretary for Public Affairs (OASPA) for review and approval. Following approval by OASPA, the SF 202 and the statement explaining why existing materials are insufficient will be forwarded to NAC by OASPA. An approved copy of the Form HHS-524A will be returned to the OPDIV for transmission to the contract negotiator. All audiovisuals are required to be acquired under the Government-wide Contracting System for Motion Picture and Videotape Productions, unless they are included in the exceptions to the mandatory use of the uniform system. (See the Executive Agent for Government-Wide Contracting System for Audiovisual Productions' March 21, 1980, memorandum on Implementation of OFPP Policy Letter No. 79-4, November 28, 1979, Contracting for Motion Picture and Videotape Productions;

HHS General Administration Manual Chapter 1-121.)

(14) *Privacy Act (Pub. L. 93-579.)* Whenever the Department contracts for the design, development, operation, or maintenance of a system of records on individuals on behalf of the Department in order to accomplish a departmental function, the Privacy Act is applicable. The program official, after consultation with the activity's Privacy Act Coordinator and the Office of General Counsel as necessary shall include a statement in the request for contract as to the applicability of the Act. Whenever an acquisition is subject to the Act, the program official prepares a "system notice" and has it published in the FEDERAL REGISTER. (See HHS Privacy Act regulation, 45 CFR 5b; FAR Subpart 24.1 and Subpart 324.1.)

(b) *Clearances or approvals required to be completed prior to contract award.* All foreign research contract projects to be conducted in a foreign country and financed by HHS funds (U.S. dollars) must have clearance by the Department of State with respect to consistency with foreign policy objectives. This clearance should be obtained prior to negotiation. Procedures for obtaining this clearance are set forth in the HHS General Administration Manual, Chapter 20-60.

[49 FR 13969, Apr. 9, 1984, as amended at 49 FR 36110, Sept. 14, 1984; 50 FR 23129, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 53 FR 15563, May 2, 1988; 53 FR 43207, Oct. 26, 1988; 53 FR 44551, Nov. 3, 1988]

### **307.105-3 Specification, purchase description and statement of work.**

One of the most important parts of a contract is the description of the work to be done. The description of that work may be in the form of a specification, purchase description or statement of work. A brief reference to specifications and purchase descriptions is provided, although the nature of the work performed in this Department usually results in the development of work statements. The development of the acquisition planning document should result in sufficient information to readily develop the description of work, usually in the form of a statement of work.

(a) *Specification.* Specification is defined in FAR 10.001. Use of the specification is primarily limited to supply or service contracts where the material end item or service to be delivered is well defined by the Government.

(b) *Purchase description.* FAR 10.001 also contains the definition of purchase description.

(c) *Statement of work.*—(1) *General.* A statement of work differs from a specification and purchase description primarily in that it describes work or services to be performed in reaching an end result rather than a detailed, well defined description or specification of the end product. The statement of work may enumerate or describe the methods (statistical, clinical, laboratory, etc.) that will be used. However, it is preferable for the offeror to propose the method of performing the work. The statement of work should specify the desired results, functions, or end items without telling the offeror what has to be done to accomplish those results unless the method of performance is critical or required for the successful performance of the contract. The statement of work should be clear and concise and must completely define the responsibilities of the Government and the contractor. The statement of work should be worded so as to make more than one interpretation virtually impossible because it has to be read and interpreted by persons of varied backgrounds, such as attorneys, contracting personnel, cost estimators, accountants, scientists, sociologists, educators, functional specialists, etc. If the statement of work does not state exactly what is wanted, or does not state it precisely, it will generate many contract management problems for both the project officer and the contracting officer. Ambiguous statements of work can create unsatisfactory performance, delays, and disputes, and can result in higher costs.

(2) *Term (level of effort) vs. completion work statement.* Careful distinctions must be drawn between term (level of effort) statements of work, which essentially require the furnishing of technical effort and a report thereof, and completion type work statements, which often require development of

tangible end items designed to meet specific performance characteristics.

(i) *Term or level of effort.* A term or level of effort type statement of work is appropriate to research where one seeks to discover the feasibility of later development, or to gather general information. A term or level of effort type statement of work may only specify that some number of labor-hours be expended on a particular course of research, or that a certain number of tests be run, without reference to any intended conclusion.

(ii) *Completion.* A completion type statement of work is appropriate to development work where the feasibility of producing an end item is already known. A completion type statement of work may describe what is to be achieved through the contracted effort, such as the development of new methods, new end items, or other tangible results.

(3) *Phasing.* Individual research, development, or demonstration projects frequently lie well beyond the present state of the art and entail procedures and techniques of great complexity and difficulty. Under these circumstances, a contractor, no matter how carefully selected, may be unable to deliver the desired result. Moreover, the job of evaluating the contractor's progress is often difficult. Such a contract is frequently phased and often divided into stages of accomplishment, each of which must be completed and approved before the contractor may proceed to the next. Phasing makes it necessary to develop methods and controls, including reporting requirements for each phase of the contract and criteria for evaluation of the reports submitted, that will provide, at the earliest possible time, appropriate data for making decisions relative to all phases. A phased contract may include stages of accomplishment such as research, development, and demonstration. Within each phase, there may be a number of tasks which should be included in the statement of work. When phases of work can be identified, the statement of work will provide for phasing and the request for proposals will require the submission of proposed costs by phases. The resultant contract will reflect costs by phases, require the

contractor to identify incurred costs by phases, establish delivery schedules by phases, and require the written acceptance of each phase. The provisions of the Limitation of Cost clause shall apply to the estimated cost of each phase. Contractors shall not be allowed to incur costs for phases which are dependent upon successful completion of earlier phases until written acceptance of the prior work is obtained from the contracting officer.

(4) *Elements of the statement of work.* The elements of the statement of work will vary with the objective, complexity, size, and nature of the acquisition. In general, it should cover the following matters as appropriate.

(i) *A general description of the required objectives and desired results.* Initially, a broad, nontechnical statement of the nature of the work to be performed. This should summarize the actions to be performed by the contractor and the results that the Government expects.

(ii) *Background information helpful to a clear understanding of the requirements and how they evolved.* Include a brief historical summary as appropriate. Include pertinent legislative history, related contracts or grants, and the relationship to overall program objectives.

(iii) *A detailed description of the technical requirements.* A comprehensive description of the work to be performed to provide whatever details are necessary for prospective offerors to submit meaningful proposals.

(iv) *Subordinate tasks or types of work.* A listing of the various tasks or types of work (it may be desirable in some cases to indicate that this is not all-inclusive). The degree of task breakout is directly dependent on the size and complexity of the work to be performed and the logical groupings. A single cohesive task should not be broken out merely to conform to a format. Indicate whether the tasks are sequential or concurrent for offeror planning purposes.

(v) *Phasing.* When phasing is applicable, describe in detail the work or effort required in each phase and the criteria for determining whether the next phase will take place. If one or more phases contain subordinate tasks or types of work, the preceding informa-

tion in paragraph (c)(4) (iv) may be incorporated into the part.

(vi) *Reference material.* All reference material to be used in the conduct of the project, such as technical publications, reports, specifications, architect or engineering drawings, etc., that tell how the work is to be carried out must be identified. Applicability should be explained, and a statement made as to where the material can be obtained.

(vii) *Level of effort.* When a level of effort is required, the number and type of personnel required should be stated. If known, the type and degree of expertise should be specified.

(viii) *Special requirements* (as applicable). An unusual or special contractual requirement, which would impact on contract performance, should be included as a separate section. Such items could include required place(s) of performance or unusual travel requirements. Clearance requirements, such as forms clearance, should be addressed.

(ix) *Deliverables reporting requirements.* All deliverables and/or reports must be clearly and completely described. For example, in a Final Study Report it is important to indicate what areas the report should cover and the criteria for use in accepting the final report to determine if the contract objectives have been satisfied. It is important to require the preparation and submission of progress reports (administrative, technical and financial) to reflect contractor certification of satisfactory progress. If possible, the reports should be coordinated in such a manner as to provide a correlation between costs incurred and the state of completion. All delivery and reporting requirements shall include the quantities, the place of delivery, and time of delivery.

#### **307.170 Program training requirements.**

(a) Chapter 8-95 of the General Administration Manual (GAM) addresses the general parameters for acquisition planning as stated in 307.104. In conjunction with the principles of proper acquisition planning, the Department has established training courses for program officials to promote expedient program management in the planning and other pertinent aspects of the acquisition process. Chapter 8-96 of the

GAM sets forth specific training requirements for program officials as follows:

(1) All program personnel selected to serve as project officer for an HHS contract shall have successfully completed either the Department's appropriate "Base Project Officer" course, or an equivalent course (see paragraph (b), below).

(2) At least fifty percent of the HHS program personnel performing the function of technical proposal evaluator on a technical evaluation team or panel for any competitively solicited HHS contract shall have successfully completed the appropriate "Basic Project Officer" course, or an equivalent course (see paragraph (b), below). This requirement applies to the initial technical proposal evaluation and any subsequent technical evaluations that may be required.

(b) Determination of course equivalency shall be made by the principal official responsible for acquisition of the cognizant contracting activity. The contracting officer is responsible for ensuring that the project officer and technical proposal evaluators have successfully completed the required training discussed in 307.170-2.

[49 FR 13969, Apr. 9, 1984, as amended at 56 FR 47002, Sept. 17, 1991]

#### **307.170-1 Policy exceptions.**

(a) *Small contracting activities.* (1) Program personnel designated to serve as project officers and technical proposal evaluators for contracts which originate in offices having a mission which only incidentally and infrequently involves the generation of contract requirements (i.e., normally less than three contract requirements per fiscal year and in an amount not exceeding \$100,000 per contract) are not required to have completed any of the referenced training courses, although completion of an appropriate "Basic Project Officer" course is recommended.

(2) As a substitute for the training, contracting officers servicing these program offices are required to ensure, as a minimum, that program personnel designated to serve as project officers and technical proposal evaluators have read and studied the "DHHS Project

Officers' Contracting Handbook," and fully understand their responsibilities. The contracting officer shall require these program personnel to furnish written certification that they have fulfilled this requirement prior to discharging the duties of project officer or technical proposal evaluator.

(b) *Urgent requirements.* In the event there is an urgent requirement for a specific individual to serve as a project officer and that individual has not successfully completed the prerequisite training course, the principal official responsible for acquisition may waive the training requirement and authorize the individual to perform the project duties, provided that:

(1) The individual first meets with the cognizant contracting officer to review the "DHHS Project Officers' Contracting Handbook," and to discuss the important aspects of the contracting—program office relationship as appropriate to the circumstances; and

(2) The individual attends the next scheduled and appropriate "Basic Project Officer" course.

[49 FR 13969, Apr. 9, 1984, as amended at 56 FR 47002, Sept. 17, 1991]

#### **307.170-2 Training course prerequisites.**

(a) *Project officers.* (1) Newly appointed project officers, and project officers with less than three years experience and no previous related training, are required to take the appropriate "Basic Project Officer" course. (The grade level for project officers attending the course should be GS-7 and above). All project officers are encouraged to take the appropriate "Writing Statements of Work" course.

(2) Project officers with more than three years experience, and project officers with less than three years experience who have successfully completed the appropriate basic course, are qualified (and encouraged) to take the "Advanced Project Officer" course.

(3) Additional information on prerequisites for attendance of these courses may be found in the "DHHS Acquisition Training and Certification Program Handbook."

(b) *Technical proposal evaluators.* Technical proposal evaluators, regardless of experience, are required to take

the appropriate “Basic Project Officer” course. Upon successful completion of the basic course, it is recommended that they take the appropriate “Advanced Project Officer” course.

[49 FR 13969, Apr. 4, 1984, as amended at 56 FR 47002, Sept. 17, 1991]

### Subpart 307.3—Contractor Versus Government Performance

#### 307.302 General.

(a) GAM Chapter 18-10, Commercial-Industrial Activities of the Department of Health and Human Services Providing Products or Services for Government Use, assigns responsibilities for making method-of-performance decisions (contract vs. in-house performance) to various management levels within the Department depending on the dollar amount of capital investment or annual operating costs. It also requires that each operating division (OPDIV), staff division (STAFFDIV) and regional office (RO) designate a “Commercial-Industrial Control Officer” (CICO) to be responsible for ensuring compliance with the requirements of the Chapter.

(d) Besides contracts with annual operating costs under \$100,000, contracts under an authorized acquisition set-aside for small business or labor surplus area concerns and contracts made pursuant to section 8(a) of the Small Business Act are exempted from the requirements of FAR Subpart 7.3, GAM Chapter 18-10, and OMB Circular No. A-76.

#### 307.303 Determining availability of private commercial sources.

In accordance with the provisions of GAM Chapter 18-10, OPDIVs, STAFFDIVs, and ROs and must prepare and maintain a complete inventory of all individual commercial or industrial activities, including those conducted under contracts in excess of \$100,000 annually. They must also conduct periodic reviews of each activity and contract in the inventory to determine if the existing performance, in-house or by contract, continues to be in accordance with the policy guidelines of GAM Chapter 18-10.

#### 307.304 Procedures.

Contracting officers shall ensure that no acquisition action involving a commercial-industrial activity is initiated unless it is in compliance with the requirements of GAM Chapter 18-10. The contracting officer must check each request for contract expected to result in a contract in excess of \$100,000 to ensure that it contains a statement as to whether the proposed contract is or is not subject to review under GAM Chapter 18-10 requirements. If the contracting officer has any questions regarding the determination of applicability or nonapplicability, or if the required statement is missing, the program office submitting the request for contract should be contacted and the situation rectified. If the issue cannot be resolved with the program office, the contracting officer shall refer the matter to the CICO for a final determination. The principal official responsible for acquisition is responsible for ensuring that contracting activities are in full compliance with FAR Subpart 7.3.

#### 307.307 Appeals.

The review and appeals procedures discussed in FAR 7.307 are addressed in GAM Chapter 18-10.

### Subpart 307.70—Considerations in Selecting an Award Instrument

#### 307.7000 Scope of subpart.

This subpart provides guidance on the appropriate selection of award instruments consistent with the Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95-224) and the OMB implementation of the Act as published in the FEDERAL REGISTER on August 18, 1978 (41 FR 36860). This subpart addresses acquisition relationships where the award instrument is the contract, and assistance relationships where the award instrument is either a grant or cooperative agreement.

#### 307.7001 Applicability.

This subpart applies to the choice of award instrument—contract, grant, or cooperative agreement—for all program and individual transactions, except where specifically prohibited by law.

**307.7002 Purpose.**

This subpart provides guidance to assist in the determination of whether to use the acquisition or assistance process to fulfill program needs. The distinction between, and use of, grants and cooperative agreements is not discussed in detail. Detailed guidance may be found in Chapter 1-02 of the Grants Administration Manual.

**307.7003 Distinction between acquisition and assistance.**

(a) The Federal Grant and Cooperative Agreement Act of 1977 requires the use of contracts to acquire property or services for the direct benefit or use of the Government and grants or cooperative agreements to transfer money, property, services, or anything of value to recipients to accomplish a public purpose of support or stimulation authorized by Federal statute.

(b) A contract is to be used as the legal instrument to reflect a relationship between the Federal Government and a recipient whenever:

(1) The principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; or

(2) The Department determines in a specific instance that the use of a type of contract is appropriate. That is, it is determined in a certain situation that specific needs can be satisfied best by using the acquisition process. However, this authority does not permit circumventing the criteria for use of acquisition or assistance instruments. Use of this authority is restricted to extraordinary circumstances and only with the prior approval of the Director, Office of Acquisition and Grants Management.

(c) A grant or cooperative agreement is to be used as the legal instrument to reflect a relationship between the Federal Government and a recipient whenever the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the recipient to accomplish a public purpose of support or stimulation authorized by Federal statute.

(1) A grant is the legal instrument to be used when no substantial involvement is anticipated between the De-

partment and the recipient during performance of the contemplated activity.

(2) A cooperative agreement is the legal instrument to be used when substantial involvement is anticipated between the Department and the recipient during performance of the contemplated activity.

(d) As a general rule, contracts are to be used for the following purposes:

(1) Evaluation (including research of an evaluative nature) of the performance of Government programs or projects or grantee activity initiated by the funding agency for its direct benefit or use.

(2) Technical assistance rendered to the Government, or on behalf of the Government, to any third party, including those receiving grants or cooperative agreements.

(3) Surveys, studies, and research which provide specific information desired by the Government for its direct activities, or for dissemination to the public.

(4) Consulting services or professional services of all kinds if provided to the Government or, on behalf of the Government, to any third party.

(5) Training projects where the Government selects the individuals or specific groups whose members are to be trained or specifies the content of the curriculum (not applicable to fellowship awards).

(6) Planning for Government use.

(7) Production of publications or audiovisual materials required primarily for the conduct of the direct operations of the Government.

(8) Design or development of items for Government use or pursuant to agency definition or specifications.

(9) Conferences conducted on behalf of the Government.

(10) Generation of management information or other data for Government use.

(e) As a general rule, grants or cooperative agreements are to be used for the following purposes:

(1) General financial assistance (stimulation or support) to eligible recipients under specific legislation authorizing the assistance.

(2) Financial assistance (stimulation or support) to a specific program activity eligible for assistance under specific legislation authorizing the assistance.

[49 FR 13969, Apr. 9, 1984, as amended at 54 FR 24343, June 7, 1989]

#### **307.7004 Procedures.**

(a) OPDIV, agency, and regional office program officials should use existing budget and program planning procedures to propose new activities and major changes in ongoing programs. It is the responsibility of these program officials to meet with the principal official responsible for acquisition and the principal grants management official, or their designees, to distinguish the relationships and determine whether award is to be made through the acquisition process or assistance process. This determination should be made prior to the time when the annual acquisition plan is reviewed and approved so that the plan will reflect all known proposed contract actions. The cognizant contracting officer will confirm the appropriateness of the use of the contract instrument when reviewing the request for contract.

(b) Shifts from one award instrument to another must be fully documented in the appropriate files to show a fundamental change in program purpose that unequivocally justifies the rationale for the shift.

(c) OPDIVs, agencies, and regional offices must ensure that the choice of instrument is determined in accordance with the Federal Grant and Cooperative Agreement Act of 1977 and applicable departmental policies. If, however, there are major individual transactions or programs which contain elements of both acquisition and assistance in such a way that they cannot be characterized as having a principal purpose of one or the other, guidance should be obtained from the Director, Office of Acquisition and Grants Management through normal channels, before proceeding with a determination.

(d) Any public notice, program announcement, solicitation, or request for applications or proposals must indicate whether the intended relationship will be one of acquisition or assistance

and specify the award instrument to be used.

[49 FR 13969, Apr. 9, 1984, as amended at 54 FR 24343, June 7, 1989]

#### **Subpart 307.71—Phase II Advance Acquisition Planning (Scheduling)**

##### **307.7101 Background.**

(a) Failure to properly plan individual acquisitions and failure to schedule the overall acquisition workload of an office, agency, or OPDIV tends to result in an inordinate percentage of contract awards being made in the closing weeks and even days of the fiscal year. This phenomenon, variously identified as “The September Rush”, “Hurry-up Spending”, “End-of-Year Purchasing”, and “Year-End Spending Abuses”, in turn fosters rushed, other than full and open competition, inadequately documented, and potentially wasteful acquisitions. Excessive year-end spending also invites increased intervention and/or scrutiny from Congress, the Office of Management and Budget, and the media. The end of the fiscal year, however, is usually too late to take corrective actions that are effective without being unduly damaging to necessary programs. The key is to begin advance acquisition planning far earlier.

(b) To avoid the historic pattern of wasteful and unnecessary year-end spending, the Department introduced the Acquisition Planning Initiative by Under Secretarial memorandum of February 19, 1980, Subject: New Procedures to Improve Planning and Scheduling of Contract Awards and Curb Last-Minute Year-End Procurement Spending. Phase II of this initiative, beginning with Fiscal Year 1981, established the present acquisition planning mechanism. Basic guidance on the Phase II mechanism is contained in the ASMB memorandum of March 28, 1980, Subject: Phase II of (Fiscal Year 1981) Procurement Planning Initiative—Guidelines for Program Funding Milestones. For the Public Health Service, the above guidance is supplemented by the ASMB memorandum of April 21,

## 307.7102

1982, Subject: Phase II Annual Procurement Planning.

[49 FR 13969, Apr. 9, 1984, as amended at 50 FR 23129, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

### **307.7102 Accountability and responsibility.**

Phase II is a Department-wide monitoring and accountability system that requires early planning of acquisition requirements down to the individual project level. The Phase II mechanism includes the following:

(a) Accountability lies with the OPDIV and STAFFDIV heads who are required to coordinate overall schedules which plot the planned distribution of RFC deliveries and contract awards over an eighteen-month timeline extending to fiscal year-end.

(b) Each OPDIV and STAFFDIV retains the flexibility to schedule individual RFC deliveries and contract awards as desired, so long as the overall schedule presents a relatively even distribution of contract awards and workload across the fiscal year.

(c) The schedules are updated quarterly to compare actual versus planned progress and, when necessary, to revise the schedules for the remainder of the fiscal year.

(d) Project officers are responsible for initiating the project planning by coordinating with contracting activities prior to RFC preparation, and taking the lead in developing acquisition plans that establish the date(s) for delivering complete RFC packages to the contracting activity, and that establish the planned award dates for individual projects.

(e) The Director, Office of Acquisition and Grants Management monitors the OPDIV and STAFFDIV Phase II plans throughout the year to assure that an even distribution of awards, dollar obligations, and workload is maintained.

[49 FR 13969, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 54 FR 24343, June 7, 1989]

### **307.7103 Purpose.**

The Phase II Advance Acquisition Planning mechanism serves to avoid excessive year-end spending and distributes the contract workload as even-

## 48 CFR Ch. 3 (10-1-97 Edition)

ly as possible over the fiscal year, and provides a mechanism for planning at the program/acquisition operational level and a management tool for monitoring at the program, OPDIV, and departmental levels.

### **307.7104 Contracting activity actions.**

The contracting activity shall take the following actions:

(a) Advise program and staff personnel of their responsibilities to ensure that:

(1) Year-end acquisitions of unplanned items are not entered into to use available balances of expiring appropriations (which would otherwise revert to the Treasury);

(2) Orders for supplies, materials, and equipment are kept to the minimum needed to carry on approved programs;

(3) Inventories are held to normal levels; and

(4) New contracts for future services and payments to contractors are made only in accordance with established plans.

(b) Determine closing dates for purchases to be made from appropriations ending on September 30.

(c) Expedite the preparation and processing of determinations and findings which require the approval of the Assistant Secretary for Management and Budget or the OPDIV head.

## **PART 309—CONTRACTOR QUALIFICATIONS**

### **Subpart 309.1—Responsible Prospective Contractors**

Sec.

309.104 Standards.

309.104-1 General standards.

309.105 Procedures.

309.105-1 Obtaining information.

### **Subpart 309.4—Debarment, Suspension, and Ineligibility**

309.403 Definitions.

309.404 Parties excluded from procurement programs.

309.405 Effect of listing.

309.405-1 Continuation of current contracts.

309.406 Debarment.

309.406-3 Procedures.

309.407 Suspension.

309.407-3 Procedures.

## Department of Health and Human Services

309.403

309.470 Reporting of suspected causes for debarment, suspension, or the taking of evasive actions.

309.470-1 Situations where reports are required.

309.470-2 Contents of reports.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 13976, Apr. 9, 1984, unless otherwise noted.

### Subpart 309.1—Responsible Prospective Contractors

#### 309.104 Standards.

##### 309.104-1 General standards.

(a) In determining the adequacy of a prospective contractor's financial resources for the performance of the proposed contract, particular attention shall be given to the ability of the contractor to discharge its full financial responsibility for charges and losses of Government-furnished material, when the contractor has responsibility for such material.

(e) The prospective contractor must have an established system of accounting and financial controls which are determined by the contracting officer to be adequate to permit the effective administration of the type of contract proposed, particularly if under its terms the costs incurred are a factor in determining the amount payable under the contract, or if advance or progress payments are requested.

#### 309.105 Procedures.

##### 309.105-1 Obtaining information.

(b)(2)(ii) To ensure that a prospective contractor has the necessary accounting and operational controls (see 309.104-1(e)), a written determination must be made by the contracting officer that the prospective contractor has an adequate accounting system for determining costs applicable to the contract and a billing system that satisfies the contractual payment provisions. The determination must explain the basis for this judgment.

(A) When dealing with high risk organizations, i.e., new organizations, those with known problems, and those with accounting system deficiencies, the contracting officer shall use every reasonable means available to protect the

Government from the improper expenditure of Federal funds. Actions should include at least one of the following: preaward and postaward audits; direct identification of cost with deliverables; billing by contract phases or tasks; fidelity bonding or other guarantees by the parent company or principals of the organization; increased scrutiny of vouchers and financial reports; and frequent site visits to verify the incurrence of specific costs and the relationship of technical progress with the amount billed.

(B) If a prospective contractor's accounting or billing system (or both) is determined to be inadequate, corrective action must be taken before that organization is awarded a contract. When corrective action cannot be completed until after the award and the contracting officer determines that the award must be made, the contracting officer shall consult with the cognizant cost advisor and take the appropriate actions set forth in FAR 16.104 to ensure that the Government's interests will be protected and the contract will be adequately costed and administered. Awards made under the preceding condition must be approved in writing by the principal official responsible for acquisition.

### Subpart 309.4—Debarment, Suspension, and Ineligibility

SOURCE: 50 FR 7780, Feb. 26, 1985, unless otherwise noted.

#### 309.403 Definitions.

*Acquiring agency's head or a designee*, as used in the FAR, shall mean, unless otherwise stated in this subpart, the head of the contracting activity. Acting in the capacity of the acquiring agency's head, the head of the contracting activity may make the required justifications or determinations, and take the necessary actions, specified in FAR §§ 9.405, 9.406, and 9.407 for his or her respective activity, but only after obtaining the approval of the debarring or suspending official, as the case may be.

*Debarring official* means the Assistant Secretary for Management and Budget, or his/her designee.

*Initiating official* means either the contracting officer, the head of the contracting activity, the Deputy Assistant Secretary for Management and Acquisition, or the Inspector General.

*Suspending official* means the Assistant Secretary for Management and Budget, or his/her designee.

[50 FR 7780, Feb. 26, 1985, as amended at 54 FR 24343, June 7, 1989; 54 FR 43965, Oct. 30, 1989]

#### **309.404 Parties excluded from procurement programs.**

(c) The Office of Management and Acquisition (OMAC) shall perform the actions required by FAR 9.404(c).

(4) OMAC shall maintain all documentation submitted by the initiating official recommending the debarment or suspension action and all correspondence and other pertinent documentation generated during the OMAC review.

[50 FR 7780, Feb. 26, 1985, as amended at 54 FR 24343, June 7, 1989; 54 FR 43966, Oct. 30, 1989]

#### **309.405 Effect of listing.**

(a) The head of the contracting activity may, with the concurrence of the debarring or suspending official, make the determinations referenced in FAR 9.405(a), regarding contracts for their respective activities.

(1) If a contracting officer considers it necessary to award a contract, or consent to a subcontract with a debarred or suspended contractor, the contracting officer shall prepare a determination, including all pertinent documentation, and submit it through acquisition channels to the head of the contracting activity. The documentation must include the date by which approval is required and a compelling reason for the proposed action. Some examples of circumstances that may constitute a compelling reason for the award to, or consent to a subcontract with, a debarred or suspended contractor include:

(i) The property or services to be acquired are available only from the listed contractor;

(ii) The urgency of the requirement dictates that the Department deal with the listed contractor; or

(iii) There are other compelling reasons which require business dealings with the listed contractor.

(2) If the head of the contracting activity decides to approve the requested action, he/she shall request the concurrence of the debarring or suspending official and, if given, shall, in writing, inform the contracting officer of the decision within the required time period.

#### **309.405-1 Continuation of current contracts.**

(a) Notwithstanding the debarment or suspension of a contractor, contracting officers may continue contracts or subcontracts in existence at the time the contractor was debarred or suspended, unless the head of the contracting activity or debarring or suspending official directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by the awarding activity's contracting and technical personnel. The contracting officer shall coordinate any termination with the Office of the General Counsel to ensure the propriety of the proposed action.

(b) Contracting officers shall not renew the current contracts of debarred or suspended contractors, or otherwise extend their duration, unless the head of the contracting activity determines to do so, with the concurrence of the debarring or suspending official. The contracting officer shall prepare a determination meeting the requirements of 309.405(a) and submit it, through acquisition channels, to the head of the contracting activity. If the head of the contracting activity agrees with the determination, he/she shall obtain the concurrence of the debarring or suspending official.

#### **309.406 Debarment.**

##### **309.406-3 Procedures.**

(a) *Investigation and referral.* Whenever an apparent cause for debarment becomes known to an initiating official, that person shall prepare a report incorporating the information required by 309.470-2, if known, and forward it through appropriate channels, with a written recommendation, to the debarring official. Contracting officers shall

forward their reports in accordance with 309.470-1. The debarring official shall initiate an investigation through such means as he/she deems appropriate.

(b) *Decisionmaking process.* The debarring official shall review the results of the investigation, if any, and make a written determination whether or not debarment procedures are to be commenced. A copy of the determination shall be promptly sent through appropriate channels to the initiating official, and the contracting officer, if necessary. If the debarring official determines to commence debarment procedures, he/she shall, after consultation with the Office of the General Counsel, notify the contractor in accordance with FAR 9.406-3(c). If the proposed action is not based on a conviction or judgment and the contractor's submission in response to the notice raises a genuine dispute over facts material to the proposed debarment, the debarring official shall arrange for fact-finding hearings and take the necessary actions specified in FAR 9.406-3(b)(2). The debarring official shall also ensure that written findings of fact are prepared, and shall base the debarment decision on the facts as found, after considering information and argument submitted by the contractor and any other information in the administrative record. The Office of the General Counsel shall represent the Department at any fact-finding hearing and may present witnesses for HHS and question any witnesses presented by the contractor.

### **309.407 Suspension.**

#### **309.407-3 Procedures.**

(a) *Investigation and referral.* Whenever an apparent cause for suspension becomes known to an initiating official, that person shall prepare a report incorporating the information required by 309.470-2, if known, and forward it through appropriate channels, with a written recommendation, to the suspending official. Contracting officers shall forward their reports in accordance with 309.470-1. The suspending official shall initiate an investigation through such means as he/she deems appropriate.

(b) *Decisionmaking process.* The suspending official shall review the results of the investigation, if any, and make a written determination whether or not suspension should be imposed. A copy of this determination shall be promptly sent through appropriate channels to the initiating official and the contracting officer, if necessary. If the suspending official determines to impose suspension, he/she shall, after consultation with the Office of the General Counsel, notify the contractor in accordance with FAR 9.407-3(c). If the action is not based on an indictment and, subject to the provisions of FAR 9.407-3(b)(2), the contractor's submission in response to the notice raises a genuine dispute over facts material to the suspension, the suspending official shall, after suspension has been imposed, arrange for fact-finding hearings and take the necessary actions specified in FAR 9.407-3(b)(2).

### **309.470 Reporting of suspected causes for debarment or suspension, or the taking of evasive actions.**

#### **309.470-1 Situations where reports are required.**

A report incorporating the information required by 309.470-2 shall be forwarded, in duplicate, by the contracting officer through acquisition channels to the OMAC when—

(a) A contractor has committed, or is suspected of having committed, any of the acts described in FAR 9.406-2 or FAR 9.407-2; or

(b) A contractor is suspected of attempting to evade the prohibitions of debarment or suspension imposed under this regulation, or any other comparable regulation, by changes of address, multiple addresses, formation of new companies, or by other devices.

[50 FR 7780, Feb. 26, 1985, as amended at 54 FR 24343, June 7, 1989]

#### **309.470-2 Contents of reports.**

Each report prepared under 309.470-1 shall be coordinated with the Office of the General Counsel and shall include the following information, where available:

(a) Name and address of contractor.

(b) Name of the principal officers, partners, owners, or managers.

(c) All known affiliates, subsidiaries, or parent firms, and the nature of the affiliation.

(d) Description of the contract or contracts concerned, including the contract number, and office identifying numbers or symbols, the amount of each contract, the amount paid the contractor and the amount still due, and the percentage of work completed and to be completed.

(e) The status of vouchers.

(f) Whether contract funds have been assigned pursuant to the Assignment of Claims Act, as amended, 31 U.S.C. 3727, 41 U.S.C. 15, and, if so assigned, the name and address of the assignee and a copy of the assignment.

(g) Whether any other contracts are outstanding with the contractor or any affiliates, and, if so, the amount of such contracts, whether these funds have been assigned pursuant to the Assignment of Claims Act, as amended, 31 U.S.C. 3727, 41 U.S.C. 15, and the amounts paid or due on such contracts.

(h) A complete summary of all available pertinent evidence.

(i) A recommendation as to the continuation of current contracts.

(j) An estimate of damages, if any, sustained by the Government as a result of the action of the contractor, including an explanation of the method used in making the estimate.

(k) The comments and recommendations of the contracting officer and statements regarding whether the contractor should be suspended or debarred, whether any limitations should be applied to such action, and the period of any proposed debarment.

(l) As an enclosure, a copy of the contract(s) or pertinent excerpts therefrom, appropriate exhibits, testimony or statements of witnesses, copies of assignments, and other relevant documentation or a written summary of any information for which documentation is not available.

## SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

### PART 313—SMALL PURCHASE AND OTHER SIMPLIFIED PURCHASE PROCEDURES

#### Subpart 313.1—General

Sec.

313.101 Definitions.

313.104 Procedures.

313.105 Small business—small purchase set-aside.

313.106 Competition and price reasonableness.

313.107 Solicitation and evaluation of quotations.

#### Subpart 313.2—Blanket Purchase Agreements

313.201 General.

313.204 Purchases under Blanket Purchase Agreements.

#### Subpart 313.4—Imprest Fund

313.403 Agency responsibilities.

#### Subpart 313.5—Purchase Orders

313.505 Purchase order and related forms.

313.505-3 Standard Form 44, Purchase Order—Invoice—Voucher.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 13977, Apr. 9, 1984, unless otherwise noted.

#### Subpart 313.1—General

##### 313.101 Definitions.

“Small purchase procedures”

(d) Acquisition of architect-engineer professional services of any dollar amount.

##### 313.104 Procedures.

(i) Small purchase methods are designed to acquire defined, off-the-shelf, standard supplies, equipment, or services which may be awarded on the basis of a fixed price quotation. Small purchase methods should not be used to acquire R & D, complex studies, services, and the like (which require judgmental technical evaluations and involve negotiations) where the award cannot be confidently made on the low price. Where requirements are not suit-

able for accomplishment using small purchase methods, more formal negotiation methods or sealed bidding should be used.

(j) Small purchases accomplished in accordance with this part may not be awarded on a cost-reimbursement basis.

(k) Small purchase methods should be used with great prudence for the acquisition of consultants to avoid the increased possibility of using consultants in an improper personal services capacity.

[49 FR 13977, Apr. 9, 1984, as amended at 50 FR 23129, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 53 FR 15563, May 2, 1988]

##### 313.105 Small business-small purchase set-aside.

(d) (2) The contracting officer shall consult with the small and disadvantaged business utilization specialist (SADBUS) to determine whether small business sources are known by the SADBUS before determining not to proceed with the small business-small purchase set-aside. Coordination with the SADBUS is not required for small purchases at or below ten percent of the small purchase limitation.

[57 FR 11689, Apr. 7, 1992]

##### 313.106 Competition and price reasonableness.

(a) *Purchases not over 10 percent of the small purchase limitation.* Purchases not exceeding this limit are exempt from the documentary requirements of FAR Subpart 6.3 and Subpart 306.3. However, purchases shall not be made repetitively from one source except for reasons which clearly and convincingly justify other than full and open competition (see FAR Subpart 6.3).

(b) *Purchases over 10 percent of the small purchase limitation.*

(4)(i)(D) Women-owned small business.

(c) *Data to support small purchases over 10 percent of the small purchase limitation.*

(2) Purchases ranging in excess of 10 percent of the small purchase limitation up to and including the small purchase limitation which are made without full and open competition require justification as to why competition was not obtained. The justification, which may be in the form of a paragraph or paragraphs in the request for contract or requisition, must address the considerations in FAR Subpart 6.3 and Subpart 306.3. The contracting officer may approve or disapprove the justification. Award of the contract or purchase order by the contracting officer shall constitute approval of the justification (see 306.304(a)(1)).

[49 FR 13977, Apr. 9, 1984, as amended at 50 FR 23129, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 56 FR 47002, Sept. 17, 1991]

### **313.107 Solicitation and evaluation of quotations.**

(e) *Amendments.* (1) If after the issuance of a request for quotations but before the closing date of their receipt, it becomes necessary (i) to make significant changes in the quantity, specifications, or delivery schedule, (ii) to make any change in the closing date, or (iii) to correct a defect or ambiguity, the change shall be accomplished by issuance of an amendment to the request. Requests for quotations using the Standard Form 18 may be amended by letter. Oral requests for quotations may be amended orally.

(2) When it is considered necessary to issue an amendment to a request for quotations, the period of time remaining before closing and the need for extending this period by postponing the time set for closing must be considered. Where only a short time remains before the time set for closing, extension of time may be made by telegram or telephone. This notification should be confirmed in the amendment.

(3) Any information given to one potential quoter concerning a request for quotations shall be furnished promptly to all other potential quoters in an amendment to the request, if the information is necessary to potential quoters in submitting quotations, or if the lack of the information would be

prejudicial to uninformed potential quoters.

[49 FR 13977, Apr. 9, 1984, as amended at 49 FR 36110, Sept. 14, 1984; 56 FR 47003, Sept. 17, 1991]

## **Subpart 313.2—Blanket Purchase Agreements**

### **313.201 General.**

(e) Each blanket purchase arrangement (BPA) shall be documented by issuance of a contractual instrument which is appropriately numbered.

### **313.204 Purchases under Blanket Purchase Agreements.**

(e)(5) Delivery documents, invoices, etc. signed by the Government employee receiving the item or service, will be forwarded to the fiscal office or other paying office as designated by the OPDIV. Payment will be made on the basis of the signed document, invoice, etc. Contracting offices will ensure that established procedures allowing for availability of funds are in effect prior to placement of orders.

[49 FR 13977, Apr. 9, 1984, as amended at 56 FR 47003, Sept. 17, 1991]

## **Subpart 313.4—Imprest Fund**

### **313.403 Agency responsibilities.**

(a) The amount of each imprest fund shall be established on the basis of the estimated monthly payment and the need for replenishment. A review shall be made by the responsible official at least quarterly to insure that the fund is not in excess of needs, and appropriate adjustments are made accordingly.

(c) Requests to establish imprest funds shall be made to the responsible fiscal office. At larger activities where the cashier may not be conveniently located near the purchasing office, a Class C Cashier may be installed in the purchasing office. Documentation of cash purchases shall be in accordance with instructions contained in the HHS Voucher Audit Manual Part 1, Chapter 1–10.

## Subpart 313.5—Purchase Orders

### 313.505 Purchase order and related forms.

#### 313.505-3 Standard Form 44, Purchase Order—Invoice—Voucher.

(d) Since the Standard Form 44 is an accountable form, a record shall be maintained of serial numbers of the form, to whom issued, and date issued. SF-44's shall be kept under adequate lock and key to prevent unauthorized use. A reservation of funds shall be established to cover total anticipated expenditures prior to use of the SF-44.

## PART 314—FORMAL ADVERTISING

### Subpart 314.2—Solicitation of Bids

Sec.

314.202-7 Facsimile bids.

314.213 Annual submission of representations and certifications.

### Subpart 314.4—Opening of Bids and Award of Contract

314.404 Rejection of bids.

314.404-1 Cancellation of invitations after opening.

314.406 Mistakes in bids.

314.406-3 Other mistakes disclosed before award.

314.406-4 Mistakes after award.

314.407 Award.

314.407-8 Protests against award.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

### Subpart 314.2—Solicitation of Bids

SOURCE: 55 FR 13536, Apr. 11, 1990, unless otherwise noted.

#### 314.202-7 Facsimile bids.

The principal official responsible for acquisition (PORA) shall determine whether to allow the use of facsimile bids. If the PORA decides to allow the use of facsimile bids, internal procedures shall be developed, in accordance with the FAR, to ensure uniform processing and control.

#### 314.213 Annual submission of representations and certifications.

Each principal official responsible for acquisition (PORA) shall determine whether to allow the use of the annual submission of representations and cer-

tifications by bidders. If allowed, the provisions of FAR 14.213 shall be followed.

### Subpart 314.4—Opening of Bids and Award of Contract

#### 314.404 Rejection of bids.

##### 314.404-1 Cancellation of invitations after opening.

(c) The chief of the contracting office (CCO) shall make the determination required by FAR 14.404-1(c).

(e) The CCO shall make the referenced determination.

[51 FR 44294, Dec. 9, 1986]

#### 314.406 Mistakes in bids.

##### 314.406-3 Other mistakes disclosed before award.

(e) Authority has been delegated to the Protest Control Officer, Division of Acquisition Policy, Office of Acquisition and Grants Management (OAGM) to make administrative determinations in connection with mistakes in bid alleged after opening and before award. This authority may not be re-delegated.

(f) Each proposed determination shall have the concurrence of the Chief, Business Law Branch, Business and Administrative Law Division, Office of General Counsel.

(g)(3) The data required by FAR 14.406-3(g)(3) shall be marked "IMMEDIATE ACTION—MISTAKE IN BID" and submitted through acquisition channels to the Protest Control Officer, Division of Acquisition Policy, Office of Acquisition and Grants Management (OAGM). The file shall be assembled in an orderly manner and shall include an index of enclosures. A single copy of the file is sufficient.

(4) Since examination of evidence is necessary to determine the proper course of action to be taken, no action will be taken on cases referred by telephone or telegraph.

(5) Where the evidence submitted by the bidder is incomplete or in need of clarification, the contracting officer shall document the file to indicate the effort made to obtain clear and convincing evidence to support the alleged mistake. Since the burden of providing

#### 314.406-4

such evidence lies with the bidder-claimant, repeated efforts to obtain such information are neither necessary nor desirable.

(i) Doubtful cases shall *not* be submitted by the contracting officer directly to the Comptroller General, but shall be submitted as indicated in 314.406-3(g)(3).

[49 FR 13978, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 54 FR 24343, June 7, 1989]

#### 314.406-4 Mistakes after award.

(c) Authority has been delegated to the Protest Control Officer, Division of Acquisition Policy, OAGM to make administrative determinations in connection with mistakes in bid alleged after award. This authority may not be re-delegated.

(d) Each proposed determination shall have the concurrence of the Chief, Business Law Branch, Business and Administrative Law Division, Office of General Counsel.

(2) The data required by FAR 14.406-4(e)(2) shall be marked "IMMEDIATE ACTION—MISTAKE IN BID" and submitted as prescribed in 314.406-3(g)(3).

[49 FR 13978, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 54 FR 24343, June 7, 1989]

#### 314.407 Award.

#### 314.407-8 Protests against award.

See Subpart 333.1—Protests.

[50 FR 23129, May 31, 1985, and 50 FR 38004, Sept. 19, 1985]

### PART 315—CONTRACTING BY NEGOTIATION

#### Subpart 315.1—General Requirements for Negotiation

Sec.

315.103 Converting from sealed bidding to negotiation procedures.

#### Subpart 315.4—Solicitation and Receipt of Proposals and Quotations

315.402 General.

315.404 Presolicitation notices and conferences.

315.405 Solicitations for information or planning purposes.

315.405-1 General.

#### 48 CFR Ch. 3 (10-1-97 Edition)

315.406 Preparing requests for proposals (RFP's) and requests for quotations (RFQ's).

315.406-1 Uniform contract format.

315.406-2 Part I—The Schedule.

315.406-3 Part II—Contract clauses.

315.406-5 Part IV—Representations and instructions.

315.407 Solicitation provisions.

315.408 Issuing solicitations.

315.409 Pre-proposal conferences.

315.410 Amendment of solicitations before closing date.

315.413 Disclosure and use of information before award.

315.413-1 Alternate I.

315.413-2 Alternate II.

315.470 Review of RFP.

315.471 Annual submission of representations and certifications.

#### Subpart 315.5—Unsolicited Proposals

315.505 Content of unsolicited proposals.

315.506 Agency procedures.

315.506-1 Receipt and initial review.

315.509 Limited use of data.

#### Subpart 315.6—Source Selection

315.602 Applicability.

315.604 Responsibilities.

315.605 Evaluation factors.

315.607 Disclosure of mistakes before award.

315.608 Proposal evaluation.

315.608-70 Technical evaluation plan.

315.608-71 Technical evaluation panel.

315.608-72 Procedures for handling and disclosing proposals.

315.608-73 Receipt of proposals.

315.608-74 Convening the technical evaluation panel.

315.608-75 Rating and ranking of proposals.

315.608-76 Technical evaluation report.

315.608-77 Evaluation of business proposals.

315.609 Competitive range.

315.610 Written or oral discussions.

315.611 Best and final offers.

315.670 Negotiation with the selected source.

315.671 Post negotiation contract preparation and award.

315.672 Preparation of negotiation memorandum.

#### Subpart 315.8—Price Negotiation

315.804 Cost or pricing data.

315.804-3 Exemptions from or waiver of submission of certified cost or pricing data.

315.805 Proposal analysis.

315.805-5 Field pricing support.

#### Subpart 315.9—Profit

315.900 Scope of subpart.

315.905-70 Structured approach.

315.905-71 Profit factors.

## Department of Health and Human Services

315.406

- 315.905-72 Contractor effort.
- 315.905-73 Other factors.
- 315.905-74 Facilities capital cost of money.

### Subpart 315.10—Preaward, Award, and Postaward Notifications, Protests, and Mistakes

- 315.1000 General.
- 315.1003 Debriefing of unsuccessful offerors.
- 315.1004 Protests against award.
- 315.1005 Discovery of mistakes.

### Subpart 315.70—Requests for Contract

- 315.7000 Scope of subpart.
- 315.7001 General.
- 315.7002 Procedures.
- 315.7003 Responsibilities.
- 315.7004 Transmittal.
- 315.7005 Format and content.
- 315.7006 Review.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486cc).

SOURCE: 49 FR 13979, Apr. 9, 1984, unless otherwise noted.

### Subpart 315.1—General Requirements for Negotiation

#### 315.103 Converting from sealed bidding to negotiation procedures.

The chief of the contracting office has the authority to make the determination referenced in FAR 15.103.

[51 FR 44294, Dec. 9, 1986]

### Subpart 315.4—Solicitation and Receipt of Proposals and Quotations

#### 315.402 General.

(i) The principal official responsible for acquisition (PORA) shall determine whether to allow the use of facsimile proposals. If the PORA decides to allow the use of facsimile proposals, internal procedures shall be developed, in accordance with the FAR, to ensure uniform processing and control.

[55 FR 13536, Apr. 11, 1990]

#### 315.404 Presolicitation notices and conferences.

(c) *Presolicitation conferences.* (1) The presolicitation conference may only be used when approved by the chief of the contracting office.

#### 315.405 Solicitations for information or planning purposes.

##### 315.405-1 General.

The determination approval required by FAR 15.405-1 that a solicitation for information or planning purposes is appropriate shall be made by the chief of the contracting office.

#### 315.406 Preparing requests for proposals (RFP's) and requests for quotations (RFQ's).

(a) The contracting officer is responsible for preparing the RFP with the assistance of the project officer. The purpose of the RFP is to convey information that prospective offerors need to prepare a proposal. The RFP includes the statement of work and the terms, conditions and provisions that will form the basis for the final definitive contract. It specifies all the information that prospective offerors must furnish to permit a meaningful and equitable evaluation of their offers. The RFP must be clear, complete, accurate, and consistent with the requirements of the acquisition so that it provides all who receive it with the same understanding of the requirements. Much of the information in the RFP is either derived directly from the request for contract or is otherwise furnished by the project officer. Therefore, it is important that the project officer develop a meaningful request for contract and supporting documentation during the initial presolicitation phase which will fully satisfy program needs and objectives when included in the RFP (see Subpart 315.70).

(b) Careful drafting of the RFP is vital to the proper working of the competitive process. The success of the acquisition depends, in large measure, on how well the work to be performed and the basic ground rules under which the competition will be conducted are described in the RFP. Particular effort must be made to develop a comprehensive and accurate statement of work (see 307.105-3 and FAR 35.007) to prevent ambiguities and to avoid misunderstandings which might otherwise surface at later stages of the acquisition.

(c) Care should be taken to avoid conflicting statements in the RFP. Clear

distinctions must be made as to the contents and purpose of the statement of work, the instructions to offerors, and the evaluation criteria. Briefly:

(1) The statement of work must clearly specify the work to be done by the resultant contractor (or, if it is an R & D acquisition, present a clear statement of the requirements, see FAR Part 35);

(2) The general, technical, and business instructions must delineate all the essential information prospective offerors need to know in preparing their proposals (see 315.406-5(b)); and

(3) The evaluation criteria must clearly indicate the technical, management, personnel, and cost or pricing factors which are to be the major considerations in selecting the successful offeror (see 315.406-5(c)).

(d) The RFP must require that proposals be submitted in two parts—a “Technical Proposal” and a “Business Proposal.” Each part is to be separate and complete in itself so that evaluation of one may be accomplished independently of the other.

(e) The technical and business proposal instructions of the RFP must provide all the information deemed essential for proper evaluation of the proposals so that all prospective offerors are aware of all requirements, and so that differences in proposals will reflect each offeror’s individual approach to the clear and unambiguous requirements and criteria stated in the RFP.

(f) The RFP must inform prospective offerors of all evaluation criteria and of the relative importance or weight attached to each criterion. Evaluation criteria must be described sufficiently enough in the RFP to inform prospective offerors of the significant matters which should be addressed in the proposals. Only the evaluation criteria set forth in the RFP shall be used in the evaluation of proposals, and the criteria can only be modified by a formal amendment to the RFP.

(g) Generally, the RFP will provide that the technical proposal not contain any reference to cost. However, resource information, such as data concerning labor hours and categories, materials, subcontracts, travel, computer time, etc., must be included in the

technical proposal so that the offeror’s understanding of the scope of work may be evaluated.

(h) The project officer should be offered the opportunity to review the finalized RFP before it is printed and released.

#### **315.406-1 Uniform contract format.**

The uniform contract format specified in FAR 15.406-1 and Table 15-1 shall be used by all contracting activities of the Department.

[49 FR 13979, Apr. 9, 1984, as amended at 50 FR 23129, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

#### **315.406-2 Part I—The Schedule.**

(a) *Section A, Solicitation/contract form.*

(3) Contracting activities are encouraged to use SF 33 for RFPs. In those instances where a contracting activity believes the SF 33 is not appropriate, a transmittal letter may be used. However, it is essential that the transmittal letter contain the pertinent information that must be brought to the attention of prospective offerors, so the information contained in FAR 15.406-2(a)(3) shall be included in it. The transmittal letter should also contain reference to the solicitation provision “Late Submissions, Modifications, and Withdrawals of Proposals or Quotations” and stress the importance of timeliness. The last paragraph of the transmittal letter should provide the name and complete telephone number of a contract specialist who can provide information concerning the solicitation.

[49 FR 13979, Apr. 9, 1984, as amended 54 FR 24343, June 7, 1989]

#### **315.406-3 Part II—Contract clauses.**

*Section I, Contract clauses.*

This section should contain all the pertinent contract clauses applicable to the acquisition, to include those contained in the general provisions, any additions or modifications to the general provisions, and special contract clauses (see Part 352—Solicitation Provisions and Contract Clauses).

**315.406-5 Part IV—Representations and instructions.**

(a) *Section K, Representations, certifications, and other statements of offerors or quoters.*

(1) This section shall begin with the following statements and continue with the applicable representations and certifications:

*To Be Completed by the Offeror:* (The Representations and Certifications must be executed by an individual authorized to bind the offeror.)

The offeror makes the following Representations and Certifications as part of its proposal (check or complete all appropriate boxes or blanks on the following pages).

Name of offeror \_\_\_\_\_

RFP No. \_\_\_\_\_

Signature of authorized individual \_\_\_\_\_

Date \_\_\_\_\_

Type name of authorized individual \_\_\_\_\_

NOTE: The penalty for making false statements in offers is prescribed in 18 U.S.C. 1001.

(2) The contracting officer shall insert in all solicitations the representations and certifications at—

(i) FAR 52.203-2, Certificate of Independent Price Determination;

(ii) FAR 52.203-4, Contingent Fee Representation and Agreement;

(iii) FAR 52.204-3, Taxpayer Identification;

(iv) FAR 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters;

(v) FAR 52.215-6, Type of Business Organization;

(vi) FAR 52.215-20, Place of Performance;

(vii) FAR 52.219-1, Small Business Concern Representation;

(viii) FAR 52.219-2, Small Disadvantaged Business Concern Representation;

(ix) FAR 52.219-3, Women-Owned Small Business Representation;

(x) FAR 52.222-19, Walsh-Healy Public Contracts Act Representation;

(xi) FAR 52.222-21, Certification of Nonsegregated Facilities;

(xii) FAR 52.222-22, Previous Contracts and Compliance Reports;

(xiii) FAR 52.222-25, Affirmative Action Compliance;

(xiv) FAR 52.223-1, Clean Air and Water Certification;

(xv) FAR 52.223-5, Certification Regarding a Drug-Free Workplace;

(xvi) FAR 52.225-1, Buy American Certification;

(xvii) FAR 52.225-12, Notice of Restrictions on Contracting With Sanctioned Persons;

(xviii) FAR 52.230-2, Cost Accounting Standards Notices and Certification (Nondefense); and

(xix) FAR 15.804-4, Certificate of Current Cost or Pricing Data; and

NOTE: The following paragraph shall be inserted between the title and text of this certificate:

(When a certificate of cost or pricing data is required to be submitted in accordance with Federal Acquisition Regulation (FAR) 15.804-4, the Contracting Officer will request that the offeror complete, execute, and submit to the Contracting Officer a certification in the format shown in the following Certificate of Current Cost or Pricing Data. The certification shall be submitted only at the time negotiations are concluded. Offerors should complete the certificate set forth below and return it when requested by the Contracting Officer.)

(xx) 352.215-71, Employer's Identification Number.

(b) *Section L, Instructions, conditions, and notices to offerors and quoters.* This section shall be comprised of the general instructions, technical proposal instructions, and business proposal instructions, as well as pertinent solicitation provisions (see FAR 15.407).

(1) *General instructions.*

(i) The general instructions provide basic guidance to prospective offerors that informs them of what is required in the preparation and submission of proposals. The general instructions must include the following statements and any instructions pertinent to the individual acquisition and applicable requirements of the OPDIV, agency, or regional office.

#### GENERAL INSTRUCTIONS

The following instructions establish the acceptable minimum requirements for the format and content of proposals:

Your special attention is directed to the requirements for technical and business proposals to be submitted in accordance with these instructions.

Any resultant contract shall include the general provisions applicable to the selected offeror's organization and type of contract awarded. Copies of general provisions may be

obtained by contacting the contracting officer. Any additional clauses required by public law, executive order, or acquisition regulations, in effect at the time of execution of the proposed contract, will be included.

The proposal must be prepared in two parts: a "Technical Proposal" and a "Business Proposal." Each of the parts shall be separate and complete in itself so that evaluation of one may be accomplished independently of evaluation of the other. The technical proposal must not contain reference to cost; however, resource information, such as data concerning labor hours and categories, materials, subcontracts, etc., must be contained in the technical proposal so that your understanding of the scope of the work may be evaluated. It must disclose your technical approach in sufficient detail to provide a clear and concise presentation that includes, but is not limited to, the requirements of the technical proposal instructions.

The proposal must be signed by an official authorized to bind your organization. (Number) copies of your technical proposal and (number) copies of your business proposal must be submitted to: (Insert complete address indicating where the proposal is to be sent and how it is to be marked. Provide similar information for hand-delivered proposals.)

You may, at your discretion, submit alternate proposals, or proposals which deviate from the requirements; *provided*, that you also submit a proposal for performance of the work as specified in the statement of work. These proposals may be considered if overall performance would be improved or not compromised, and if they are in the best interest of the Government. Alternate proposals, or deviations from any requirements of this RFP, must be clearly identified.

The Government will evaluate proposals in accordance with the evaluation criteria set forth in Section M of this request for proposals.

It is understood that your proposal will become part of the official contract file.

The RFP does not commit the Government to pay any cost for the preparation and submission of a proposal. In addition, the Contracting Officer is the only individual who can legally commit the Government to the expenditure of public funds in connection with this proposed acquisition.

(ii) Include either of the following in the General Instructions if prospective offerors are to be informed of the Government's estimate of the level of effort necessary to accomplish the requirement:

The Government considers the level of effort to perform the resultant contract should take the following staff-hours: (insert a breakdown of the Government's staff-hour

estimates by categories). These estimates are furnished for the offeror's information only and are not to be considered restrictive for proposal purposes; or

To assist you in the preparation of your proposal, the Government considers the effort to perform this contract to be approximately (insert the total number) staff-hours. This number is furnished for the offeror's information only and is not considered restrictive for proposal purposes.

NOTE: The first paragraph should only be used for term (e.g. level of effort task order), rather than completion type, contracts.)

(iii) If the proposed contract will involve performance or services on a Government installation, insert the following in the General Instructions:

Offerors are urged and expected to inspect the site where services are to be performed and to satisfy themselves as to all general and local conditions that may affect the cost of performance of the contract, to the extent such information is reasonably obtainable. In no event will failure to inspect the site constitute grounds for claims by the contractor after the award of a contract.

(iv) If reference material is to be provided for use in preparation of proposals, insert either of the following:

To assist offerors in preparing their proposals, reference material consisting of (insert title or description of publications, specifications, drawings, reports, or other documentation being made available as reference material) will be available for inspection at (insert name and address of building and room number).

Offerors are expected to examine all reference material prior to preparation and submission of their proposals. Failure to do so will be at the offeror's risk; or

To assist offerors in preparing their proposals, reference material consisting of (insert title or description of publications, specifications, drawings, reports, or other documentation being furnished as reference material) is enclosed. Offerors are expected to examine all reference material prior to preparation and submission of their proposal. Failure to do so will be at the offeror's risk.

(v) If the reference material being provided is to be returned to the Government, include the following statement:

All reference material furnished hereunder shall be returned within (insert number) days after the submission of proposals to (insert name and address of building and room number).

(vi) If an incentive type contract is being considered, a notice to the offeror of the Government's desire as to use of incentives considered applicable, objectives of the incentive performance goals, schedules, milestones, critical delivery parameters, and similar information must be included.

(2) *Technical proposal instructions.*

(i) The technical proposal instructions should clearly and concisely describe the information prospective offerors must provide in their technical proposals. The instructions should address the need for submission of a detailed work plan indicating how each aspect of the statement of work is to be accomplished, a discussion of how the work is to be organized, staffed, and managed, and statements of the qualifications and experience of the prospective offeror and its key personnel.

(ii) The technical proposal instructions must be specific enough to convey the information the program office will require from offerors to allow the technical proposal evaluators to determine whether a proposal is acceptable. Therefore, it is essential that the instructions are written to elicit the information necessary to fully address all the elements of the work plan with particular emphasis on the evaluation criteria, so that evaluators may readily evaluate each offer in the pertinent areas. The instructions should not require the submission of excessive information since this will complicate the evaluation process and could cause unnecessary proposal preparation costs for offerors.

(iii) The technical proposal instructions should require that technical proposals be prepared in a specified format to facilitate evaluation. A uniform format will minimize evaluators' efforts and should minimize the amount of extraneous and voluminous material sometimes included in proposals.

(iv) Since specific instructions must be developed to suit the needs of the individual acquisition, detailed guidance concerning the contents of the technical proposal instructions is not presented here. However, the following represents a sampling of general statements which may be helpful in the preparation of the instructions:

TECHNICAL PROPOSAL INSTRUCTIONS

Proposals which merely offer to conduct a program in accordance with the requirements of the Government's scope of work will not be eligible for award. You must submit an explanation of the proposed technical approach in conjunction with the tasks to be performed in achieving the project objectives.

A detailed work plan must be submitted indicating how each aspect of the statement of work is to be accomplished. Your technical approach should be in as much detail as you consider necessary to fully explain your proposed technical approach or method. The technical proposal should reflect a clear understanding of the nature of the work being undertaken.

The technical proposal must include information on how the project is to be organized, staffed, and managed. Information should be provided which will demonstrate your understanding and management of important events or tasks. You must explain how the management and coordination of consultant and/or subcontractor efforts will be accomplished.

The technical proposal must include a list of names and proposed duties of the professional personnel, consultants, and key subcontractor employees assigned to the project. Their résumés should be included and should contain information on education, background, recent experience, and specific scientific or technical accomplishments. The approximate percentage of time each individual will be available for this project must be included. The proposed staff hours for each of the above individuals should be allocated against each task or subtask for the project.

The technical proposal must provide the general background, experience, and qualifications of the organization. Similar or related contracts, subcontracts, or grants should be included and contain the name of the customer, contract or grant number, dollar amount, time of performance, and the names and telephone numbers of the project officer and contracting/grants officer.

The technical proposal must contain a discussion of present or proposed facilities and equipment which will be used in the performance of the contract.

The technical proposal must be prepared and submitted in the following format:

(Provide the required format.)

(3) *Business proposal instructions.* Business proposal instructions consist of cost and pricing data and administrative and management data.

(i) *Cost and pricing data.* Prospective offerors must be informed in the business proposal instruction that they are

required to submit cost or pricing information in sufficient detail to allow a complete cost analysis. (See FAR 15.804 for requirements on cost or pricing data.) Categories and amounts of labor, materials, travel, computer time, overhead and other costs should be requested. Prospective offerors are to be provided Standard Form 1411, Contract Pricing Proposal Cover Sheet, for use in preparing the cost of pricing data, and are to be told to submit, as a minimum, cost proposals fully supported by cost and pricing data adequate to establish the reasonableness of the proposed amount. Prospective offerors are to comply with the instruction on the SF 1411 and fill in or check the appropriate boxes. In addition, they should be informed to itemize the cost for individual elements, each as analytical studies, reports, etc., and the estimated cost of each phase or segment of the offered performance.

(ii) *Administrative and management data.*

(A) The business proposal instructions must be written so that the contracting officer receives adequate information to evaluate each offeror's management capability and to determine whether each offeror is responsible. Therefore, under this section, information should be requested to allow the contracting officer to assess the following factors as they apply to the instant acquisition:

- (1) The offeror's financial capability;
- (2) The offeror's capability to meet delivery or performance schedules;
- (3) The offeror's record of past performance;
- (4) The offeror's record of business integrity;
- (5) The offerors's possession of necessary organization, experience, and technical skills, or the ability to obtain them;
- (6) The offeror's possession of required facilities; and
- (7) Any other special consideration involved in the instant acquisition.

In some cases, these factors may duplicate evaluation criteria and may be adequately addressed in the technical proposal instructions. However, the contracting officer must ensure that they are covered in both the business

proposal instructions and the technical proposal instructions.

(B) The contracting officer may determine that other administrative data in the form of additional business or cost information is necessary. Some examples of additional information include:

- (1) A copy of the current agreement on indirect cost rates;
- (2) A copy of the most recent financial statements;
- (3) A discussion on the extent of proposed subcontracting with small and disadvantaged business enterprises;
- (4) A request for pricing or cost breakdown tailored to the instant acquisition to provide information for a more thorough and complete cost analysis; and
- (5) A request for explicit instructions on pricing of options and individual line items.

However, care should be taken to request additional information only when necessary, to prevent excessive proposal preparation costs for offerors.

(C) The following are required statements which must be included in the RFP.

Your proposal must stipulate that it is predicated upon all the terms and conditions of this RFP. In addition, it must contain a statement to the effect that it is firm for a period of at least (insert number) days from the date of receipt by the Government.

It is HHS policy that contractors provide all equipment and facilities necessary for performance of contracts; however, in some instances, an exception may be granted to furnish Government-owned property or to authorize purchase with contract funds. If additional equipment must be acquired, you must include in your proposal the description and estimated cost of each item, and whether you propose to furnish the item with your own funds.

You must identify all Government-owned property in your possession and all property acquired from Federal funds, to which you have title, that is proposed to be used in the performance of the prospective contract.

The management and control of Government property must be in accordance with HHS Publication (OS) 686 entitled, "Contractor's Guide for Control of Government Property (1990)," a copy of which will be provided upon request.

(c) *Section M, Evaluation factors for award—(1) General.* (i) The evaluation criteria must be developed by the

project officer and submitted to the contracting officer in the request for contract (RFC) for inclusion in the RFP. Development of these criteria and the assignment of the relative importance or weight to each criterion require the exercise of judgment on a case-by-case basis because they must be tailored to the requirements of the individual acquisition. Since the criteria will serve as a standard against which all proposals will be evaluated, it is imperative that they be chosen carefully to emphasize those factors considered to be critical in the selection of a contractor.

(ii) The finalized evaluation criteria and indications of their relative importance or weights, as included in the RFP, cannot be changed except by a formal amendment to the RFP issued by the contracting officer. No factors other than those set forth in the RFP shall be used in the evaluation of proposals.

(2) *Review of evaluation criteria.* (i) The evaluation criteria should be reviewed by the contracting officer in terms of the work statement. This review is not intended to dictate to the program office or project officer, but rather to ensure that the evaluation criteria are clear, concise, and fair so that all potential offerors are fully aware of the bases for proposal evaluation and are given an equal opportunity to compete.

(ii) The project officer and the contracting officer should then review the evaluation criteria together to ascertain the following:

(A) The criteria are described in sufficient detail to provide the offerors (and evaluators) with a total understanding of the factors to be involved in the evaluation process;

(B) The criteria address the key programmatic concerns which the offerors must be aware of in preparing proposals;

(C) The criteria are specifically applicable to the instant acquisition and are not merely restatements of criteria from previous acquisitions which are not relevant to this acquisition; and

(D) The criteria are selected to represent only the significant areas of importance which must be emphasized rather than a multitude of factors. (All

criteria tend to lose importance if too many are included. Using too many criteria will prove as detrimental as using too few.)

(3) *Examples of topics that form a basis for evaluation criteria.* Typical examples of topics that form a basis for the development of evaluation criteria are listed in the following paragraphs. These examples are intended to assist in the development of actual evaluation criteria for a specific acquisition and should only be used if they are applicable to that acquisition. They are not to be construed as actual examples of evaluation criteria to be included in the RFP.

(i) Understanding of the problem and statement of work;

(ii) Method of accomplishing the objectives and intent of the statement of work;

(iii) Soundness of the scientific or technical approach for executing the requirements of the statement of work (to include, when applicable, preliminary layouts, sketches, diagrams, other graphic representations, calculations, curves, and other data necessary for presentation, substantiation, justification, or understanding of the approach);

(iv) Special technical factors, such as experience or pertinent novel ideas in the specific branch of science or technology involved;

(v) Feasibility and/or practicality of successfully accomplishing the requirements (to include a statement and discussion of anticipated major difficulties and problem areas and recommended approaches for their resolution);

(vi) Availability of required special research, test, and other equipment or facilities;

(vii) Managerial capability (ability to achieve delivery or performance requirements as demonstrated by the proposed use of management and other personnel resources, and to successfully manage the project, including subcontractor and/or consultant efforts, if applicable, as evidenced by the management plan and demonstrated by previous experience).

(viii) Availability, qualifications, experience, education, and competence of

professional, technical, and other personnel, to include proposed subcontractors and consultants (as evidenced by resumes, endorsements, and explanations of previous efforts); and

(ix) Soundness of the proposed staff time or labor hours, propriety of personnel classifications (professional, technical, others), necessity for type and quantity of material and facilities proposed, validity of proposed subcontracting, and necessity of proposed travel.

(4) *Relative importance or weight.*

(i) A statement or indication of the relative importance or weight must be assigned to each evaluation criterion to inform prospective offerors (and evaluators) of the specific significance of each criterion in comparison to the other criteria. Similarly, if a criterion is subdivided into parts, each of the parts must be assigned a statement or indication of the relative importance or weight.

(ii) The two principal methods used to indicate the relative importance or weight are the numerical score and adjective description. The Department does not prescribe a single method for determining the relative importance or weight, but recommends the use of the numerical score method because it is more precise and informative. However, it is recognized that in some instances the use of the adjective description method be more appropriate and, hence, may be used when that determination is made.

(iii) Cost or price is not generally included as one of the evaluation criteria and is not assigned an indication of relative importance or weight. However, a statement must be included in the RFP to reflect the relationship of cost or price in comparison to the other criteria. The contracting officer must ensure that this statement accurately reflects the appropriate balance between cost or price and the technical factors. The contracting officer and project officer should work together in arriving at the final determination regarding the relationship. The following are examples of statements that may be used to reflect this relationship. However, since these examples represent only the two extremes and the middle position, another statement may be devel-

oped to reflect the relationship which applies to the instant acquisition.

(A) You are advised that paramount consideration shall be given to the evaluation of technical proposals rather than cost or price.

(B) You are advised that paramount consideration shall be given to cost or price rather than the evaluation of technical proposals.

(C) You are advised that the evaluation of technical proposals and cost or price are of approximately equal value.

[49 FR 13979, Apr. 9, 1984; 49 FR 36110, Sept. 14, 1984, as amended at 53 FR 43207, Oct. 26, 1988; 54 FR 24343, June 7, 1989; 54 FR 43966, Oct. 30, 1989; 56 FR 47003, Sept. 17, 1991]

**315.407 Solicitation provisions.**

(c)(2) The referenced provision (FAR 52.215-6, Type of Business Organization) is a representation, has been included under Section K (see 315.406-5(a)(2)(iii)), and need not be restated again.

(8) The provision at 352.215-12 shall be used in place of that specified at FAR 52.215-12.

(g) The referenced provision (FAR 52.215-20, Place of Performance) is to be considered a certification and is included under section K (see 315.406-5(a)(2)(iv)); it need not be restated again.

(n) The contracting officer shall insert the provision at FAR §52.233-2, Service of Protest, in solicitations as required by FAR 33.106(a).

[49 FR 13979, Apr. 9, 1984, as amended at 54 FR 43966, Oct. 30, 1989; 57 FR 11690, Apr. 7, 1992]

**315.408 Issuing solicitations.**

The minimum proposal preparation or response time between the date of distribution of a RFP and the date set for receipt of proposals shall not be less than 30 calendar days.

[49 FR 13979, Apr. 9, 1984, as amended at 53 FR 43208, Oct. 26, 1988]

**315.409 Pre-proposal conferences.**

If a pre-proposal conference is to be held, the provision at 352.215-72 shall be included in the solicitation.

**315.410 Amendment of solicitations before closing date.**

For additional information on amendments to solicitations, see FAR 15.606.

**315.413 Disclosure and use of information before award.****315.413-1 Alternate I.**

The Department shall not use Alternate I procedures.

**315.413-2 Alternate II.**

The Department shall use the Alternate II procedures as modified in this subsection and shall use the provision at 352.215-12, Restriction on Disclosure and Use of Data, rather than the similar provision at FAR 15.215-12 (see 315.407(c)(8)). Any reference in the FAR to the provision at FAR 52.215-12 shall apply to the provision at 352.215-12.

(b) The term "data," as used in this section and in 352.215-12, refers to trade secrets, business data, and technical data. Trade secrets, within the meaning of 18 U.S.C. 1905, include, for example, processes, formulas, and chemical compositions. Business data includes, for example, commercial information, financial information, and cost and pricing data. Technical data includes, for example, plans, designs, suggestions, improvements and concepts.

The Department recognizes that requests for proposals may require the offeror, including its prospective subcontractor(s), if any, to submit data which the offeror does not want used or disclosed for any purpose other than for evaluation of the proposal. Each proposal containing data which the offeror desires to restrict must be marked on the cover sheet by the offeror with the legend set forth at 352.215-12. Proposals, or portions of proposals, so marked shall be handled in accordance with the provisions of the legend.

(c) Contracting officers receiving proposals which contain restrictive statements or legends not conforming to the referenced provision at 352.215-12 must carefully evaluate the form and substance of the restriction before making a determination to reject the proposal. Deviations in form which do not compromise the Government's rights may be accepted if approved by the activi-

ty's FOI official and the Office of General Counsel, Business and Administrative Law Division.

(e) The Government notice shown in FAR 15.413-2(e) shall be used by this Department and is to be placed on the cover sheet of each proposal or quotation upon its receipt. The Government notice shall be completed by adding the following to the end of the last sentence: "HHSAR paragraph 315.608-72."

(f) The Department sometimes finds it necessary (and in some instances is required by law) to seek evaluation of proposals outside the Department (see 315.608(d)(6)). All conditions required by FAR 15.413-2(f) have been met and are covered in 315.608-72. Procedures for handling and disclosing proposals. In regard to item (f)(1) of FAR 15.413-2, the Department has found that the procedure stated in the first sentence of paragraph 315.608-72 is best and considers it in compliance with the FAR requirement.

(g) See subpart 324.2 for detailed procedures concerning FOIA requests.

[49 FR 13979, Apr. 9, 1984; 49 FR 36110, Sept. 14, 1984, as amended at 51 FR 44294, Dec. 9, 1986]

**315.470 Review of RFP.**

The principal official responsible for acquisition shall establish procedures to ensure that an independent review of the RFP is made between the time the synopsis is sent to the Commerce Business Daily announcing the availability of the RFP and the release date of the RFP. The individual selected to conduct the review must possess the acquisition knowledge necessary to readily ascertain whether the RFP contains the required information to be in conformance with all laws, regulations, and internal procedures and instructions. The individual selected to conduct the review must be a person other than the preparer of the RFP.

[49 FR 13979, Apr. 9, 1984, as amended at 50 FR 23129, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

**315.471 Annual submission of representations and certifications.**

Each Principal Official Responsible for Acquisition (PORA) shall determine

whether to allow the use of the annual submission of representations and certifications by offerors. If allowed, the provisions of FAR 14.213 shall be followed.

[55 FR 13536, Apr. 11, 1990]

### Subpart 315.5—Unsolicited Proposals

#### 315.505 Content of unsolicited proposals.

(d) Certification by offeror—To ensure against contacts between Department employees and prospective offerors which would exceed the limits of advance guidance set forth in FAR 15.504 resulting in an unfair advantage to an offeror, the principal official responsible for acquisition (or designee) shall ensure that the following certification is furnished to the prospective offeror and the executed certification is included as part of the resultant unsolicited proposal:

##### UNSOLICITED PROPOSAL CERTIFICATION BY OFFEROR

This is to certify, to the best of my knowledge and belief, that:

a. This proposal has not been prepared under Government supervision.

b. The methods and approaches stated in the proposal were developed by this offeror.

c. Any contact with employees of the Department of Health and Human Services has been within the limits of appropriate advance guidance set forth in FAR 15.504.

d. No prior commitments were received from departmental employees regarding acceptance of this proposal.

Date: \_\_\_\_\_

Organization: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

(This certification shall be signed by a responsible official of the proposing organization or a person authorized to contractually obligate the organization.)

#### 315.506 Agency procedures.

(a) The principal official responsible for acquisition is responsible for establishing procedures to comply with FAR 15.506(a).

(b) The principal official responsible for acquisition or his/her designee shall be the point of contact for coordinating the receipt and handling of unsolicited proposals. Contacts made outside the contracting activity shall be promptly

coordinated with the principal official responsible for acquisition or the designee.

#### 315.506–1 Receipt and initial review.

(d) An unsolicited proposal shall not be refused consideration merely because it was initially submitted as a grant application. However, contracts shall not be awarded on the basis of unsolicited proposals which have been rejected for grant support on the ground that they lack scientific merit.

#### 315.509 Limited use of data.

The legend, Use and Disclosure of Data, prescribed in FAR 15.509(a) is to be used by the offeror to restrict the use of data for evaluation purposes only. However, data contained within the unsolicited proposal may have to be disclosed as a result of a request submitted pursuant to the Freedom of Information Act. Because of this possibility, the following notice shall be furnished to all prospective offerors of unsolicited proposals whenever the legend is provided in accordance with FAR 15.504(b)(7):

The Government will attempt to comply with the "Use and Disclosure of Data" legend. However, the Government may not be able to withhold a record (data, document, etc.) nor deny access to a record requested by an individual (the public) when an obligation is imposed on the Government under the Freedom of Information Act, 5 U.S.C. 552, as amended. The Government's determination to withhold or disclose a record will be based upon the particular circumstances involving the record in question and whether the record may be exempted from disclosure under the Freedom of Information Act. Records which the offeror considers to be trade secrets and commercial or financial information and privileged or confidential must be identified by the offeror as indicated in the referenced legend.

### Subpart 315.6—Source Selection

#### 315.602 Applicability.

(b) This subpart does not apply to contracts for architect-engineer services or contracts awarded to the Small Business Administration under section 8(a) of the Small Business Act.

**315.604 Responsibilities.**

(d) Personnel participating in the evaluation process must not discuss or reveal information concerning the evaluations except to an individual participating in the same evaluation proceedings, and then only to the extent that the information is required in connection with the proceedings. Divulging information during the evaluation, selection, and negotiation phases of the acquisition to offerors or to personnel not having a need to know could jeopardize the resultant award. Therefore, the contracting officer must instruct personnel participating in the evaluations to observe these restrictions and insure that all personnel understand that unauthorized disclosure of information, no matter how innocent, could compromise the acquisition process and is prohibited.

(e) Only the contracting officer or his/her authorized representative within the contracting office shall conduct discussions with offerors relative to any aspect of the acquisition.

**315.605 Evaluation factors.**

(e) The evaluation criteria included in the solicitation serve as the standard against which all proposals are evaluated. Prospective offerors rely upon the evaluation criteria in the solicitation in developing proposals, and they must be assured that the evaluation is conducted in accordance with those criteria. All personnel involved in the evaluation process must make sure that the evaluation criteria contained in the solicitation are the *only* criteria used in conducting the evaluation. See FAR 15.406-5(c) and 315.406-5(c) for detailed guidance on evaluation criteria.

**315.607 Disclosure of mistakes before award.**

(a) The contracting officer shall require that offerors' clarifications are in writing.

(c)(3) The chief of the contracting office is authorized to make the written determination permitting a correction of a mistake in a proposal.

**315.608 Proposal evaluation.**

(a)(1) *Cost of price evaluation.* (See 315.608-77.)

(2) *Technical evaluation.* (See 315.608-75 and 76.)

(b) The determination required by FAR 15.608(b) shall be made by the chief of the contracting office.

[50 FR 23130, May 31, 1985, and 50 FR 38004, Sept. 19, 1985, as amended at 51 FR 44294, Dec. 9, 1986]

**315.608-70 Technical evaluation plan.**

(a) A technical evaluation plan may be required by the contracting officer, at his/her discretion, when an acquisition is sufficiently complex as to warrant a formal plan.

(b) The technical evaluation plan should include at least the following:

(1) A list of technical evaluation panel members, their organizations as well as a list of their major consulting clients (if applicable), their qualifications, and curricula vitae (if available);

(2) A justification for using non-Government technical evaluation panel members. (Justification is not required if non-Government evaluators will be used in accordance with standard contracting activity procedures or policies);

(3) A statement that there is no apparent or actual conflict of interest regarding any panel member;

(4) A copy of each rating sheet, approved by the contracting officer, to be used to assure consistency with the evaluation criteria; and

(5) A brief description of the general evaluation approach.

(c) The technical evaluation plan must be signed by an official within the program office in a position at least one level above the project officer or in accordance with contracting activity procedures.

(d) The technical evaluation plan should be submitted to the contracting officer for review and approval before the solicitation is issued. The contracting officer shall make sure that the principal factors relating to the evaluation are reflected in the evaluation criteria when conducting the review of the plan.

[50 FR 23130, May 31, 1985, and 50 FR 38004, Sept. 19, 1985]

**315.608-71 Technical evaluation panel.**

(a) *General.* (1) A technical evaluation panel is required for all acquisitions

applicable to this subpart which are expected to exceed \$300,000. The contracting officer has the discretion to require a technical evaluation panel for acquisitions not exceeding \$300,000 based on the complexity of the acquisition.

(2) The technical evaluation process requires careful consideration regarding the size, composition, expertise, and function of the technical evaluation panel. The efforts of the panel can result in the success or failure of the acquisition.

(b) *Role of the project officer.* (1) The project officer is the contracting officer's technical representative for the acquisition action. The project officer may be a voting member of the technical evaluation panel, and may also serve as the chairperson of the panel, unless prohibited by law or contracting activity procedures.

(2) The project officer is responsible for recommending panel members who are knowledgeable in the technical aspects of the acquisition and who are competent to identify strengths and weaknesses of the various proposals. The program training requirements specified in 307.170 must be adhered to when selecting prospective panel members.

(3) The project officer shall ensure that persons possessing expertise and experience in addressing issues relative to sex, race, national origin, and handicapped discrimination be included as panel members in acquisitions which address those issues. The intent is to balance the composition of the panel so that qualified and concerned individuals may provide insight to other panel members regarding ideas and approaches to be taken in the evaluation of proposals.

(4) The project officer is to submit the recommended list of panel members to an official within the program office in a position at least one level above the project officer or in accordance with contracting activity procedures. This official will review the recommendations, appoint the panel members, and select the chairperson.

(5) The project officer shall arrange for adequate and secure working space for the panel.

(c) *Role of the contracting officer.* (1) The contracting officer is the Depart-

ment's official representative with delegated acquisition authority to enter into and administer contracts. The term "contracting officer," as used in this subpart, may be the contracting officer or his/her designated representative within the contracting office.

(2) The contracting officer shall not serve as a member of the technical evaluation panel but should be available to:

(i) Address the initial meeting of the technical evaluation panel (see 315.608-74(c));

(ii) Provide assistance to the evaluators as required; and

(iii) Ensure that the scores adequately reflect the written technical evaluation report comments (see 315.608-76).

(d) *Conflicts of interest.* (1) If a panel member has an actual or apparent conflict of interest related to a proposal under evaluation, he/she shall be removed from the panel and replaced with another evaluator. If a suitable replacement is not available, the panel shall perform the review without a replacement.

(2) For the purposes of this subpart, conflicts of interest are defined in the Department's Standards of Conduct set forth in 45 CFR Part 73 which incorporates 5 CFR Part 737, Post Employment Conflict of Interest. The Standards of Conduct shall be applicable to both in-house personnel and outside evaluators serving on the technical evaluation panel.

(e) *Continuity of evaluation process.* (1) The technical evaluation panel is responsible for evaluating the original proposals, making recommendations to the chairperson regarding clarifications and deficiencies of proposals, and, if required by the contracting officer, assisting the contracting officer during discussions and negotiations, and reviewing supplemental, revised and/or "best and final" offers. To the extent possible, the same evaluators should be available throughout the entire evaluation and selection process to ensure continuity and consistency in the treatment of proposals. The following are examples of circumstances when it

would *not* be necessary for the technical evaluation panel to evaluate revised proposals submitted during the acquisition:

(i) The answers to questions do not have a substantial impact on the proposal (see 315.609(i));

(ii) The "best and final" offers are not materially different from the original proposals; or

(iii) The rankings of the offerors are not affected because the revisions to the proposals are relatively minor.

(2) The chairperson, with the concurrence of the contracting officer, may decide not to have the panel evaluate the revised proposals. Whenever this decision is made, it must be fully documented by the chairperson and approved by the contracting officer.

(3) When technical evaluation panel meetings are considered necessary by the contracting officer, the attendance of evaluators is mandatory. When the chairperson determines that an evaluator's failure to attend the meetings is prejudicial to the evaluation, the chairperson shall replace the individual after discussing the situation with the contracting officer and obtaining his/her concurrence and the approval of the program official responsible for appointing the panel members (see 315.608-71(b)(4)).

(4) Whenever continuity of the evaluation process is not possible, and either new evaluators are selected or a reduced panel is decided upon, each proposal which is being reviewed at any stage of the acquisition shall be reviewed at that stage by all members of the revised panel unless it is impractical to do so because of the receipt of an unusually large number of proposals.

(f) *Use of outside evaluators.* (1) The technical evaluation panel shall be composed of Government employees except when outside evaluators possess a required expertise which is not available within the Government, or as required by law.

(2) The National Institutes of Health (NIH) and the Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA) are required to have a peer review of research and development contracts in accordance with Pub. L. (Pub. L.) 93-352 as amended by Pub. L.

94-63; 42 U.S.C. 289 1-4. This legislation requires peer review of projects and proposals, and not more than one-fourth of the members of a peer review group may be officers or employees of the United States. NIH and ADAMHA are therefore exempt from the provisions of 315.608-71 to the extent that 42 U.S.C. 289 1-4 applies.

[50 FR 23130, May 31, 1985, and 50 FR 38004, Sept. 19, 1985, as amended at 53 FR 15563, May 2, 1988]

#### **315.608-72 Procedures for handling and disclosing proposals.**

(a) The procedures and notice specified in FAR 15.413-2 and 315.413-2 shall be used in handling solicited proposals and for disclosing proposals outside the Government for evaluation purposes. (For unsolicited proposals, see FAR 15.509 and 315.509.)

(b) Decisions to disclose proposals outside the Government for evaluation purposes shall be made by the chief official having programmatic responsibility for the acquisition, after consultation with the contracting officer and in accordance with operating division procedures. The decision to disclose either a solicited or unsolicited proposal outside the Government for the purpose of obtaining an evaluation shall take into consideration the avoidance of organizational conflicts of interest and any competitive relationship between the submitter of the proposal and the prospective evaluator(s).

(c) When it is determined to disclose a solicited proposal outside the Government for evaluation purposes, the following or similar conditions shall be included in the written agreement with the evaluator(s) prior to disclosure (see FAR 15.413-2(f) and 315.413-2(f)). Also, a review must be made to ensure that the notice required by FAR 15.413-2(e) is affixed to the proposal before it is disclosed to the evaluator(s).

#### **CONDITIONS FOR EVALUATING PROPOSALS**

The evaluator agrees to use the data (trade secrets, business data, and technical data) contained in the proposal only for evaluation purposes.

This requirement does not apply to data obtained from another source without restriction.

Any notice or legend placed on the proposal by either the Department or the submitter of the proposal shall be applied to any reproduction or abstract provided to the evaluator or made by the evaluator. Upon completion of the evaluation, the evaluator shall return the Government-furnished copy of the proposal or abstract, and all copies thereof, to the Departmental office which initially furnished the proposal for evaluation.

Unless authorized by the Department's initiating office, the evaluator shall not contact the submitter of the proposal concerning any aspects of its contents.

The evaluator will be obligated to obtain commitments from its employees and sub-contractors, if any, in order to effect the purposes of these conditions.

[50 FR 23131, May 31, 1985, and 50 FR 38004, Sept. 19, 1985]

#### **315.608-73 Receipt of proposals.**

(a) After the closing date set by the solicitation for the receipt of proposals, the contracting officer will use a transmittal memorandum to forward the technical proposals to the project officer or chairperson for evaluation. The business proposals will be retained by the contracting officer for evaluation (see 315.608-77).

(b) The transmittal memorandum to the chairperson shall include at least the following:

(1) A list of the names of the organizations submitting proposals;

(2) A reference to 315.604(d) on the need to preserve the integrity of the source selection process;

(3) A requirement for a technical evaluation report in accordance with 315.608-76; and

(4) The establishment of a date for receipt of the technical evaluation report.

[50 FR 23131, May 31, 1985, and 50 FR 38004, Sept. 19, 1985]

#### **315.608-74 Convening the technical evaluation panel.**

(a) Normally, the technical evaluation panel will convene to evaluate the proposals. However, there may be situations when the contracting officer determines that it is not feasible for the panel to convene. Whenever this decision is made, care must be taken to assure that the technical review is closely monitored to produce acceptable results.

(b) When a panel is convened, the chairperson is responsible for the control of the technical proposals provided to him/her by the contracting officer for use during the evaluation process. The chairperson will generally distribute the technical proposals at the initial panel meeting and will establish procedures for securing the proposals whenever they are not being evaluated to insure their confidentiality. After the evaluation is complete, all proposals must be returned to the contracting officer, destroyed or filed in an appropriate manner to maintain the confidential nature of the data.

(c) The contracting officer shall address the initial meeting of the panel and state the basic rules for conducting the evaluation. The contracting officer shall provide written guidance to the panel if he/she is unable to attend the initial panel meeting. The guidance should include:

(1) An explanation of conflicts of interest (see 315.608-71(d));

(2) The necessity to read and understand the solicitation, especially the statement of work and evaluation criteria, prior to reading the proposals;

(3) The need for evaluators to restrict the review to only the solicitation and the contents of the technical proposals;

(4) The need for each evaluator to review all the proposals;

(5) The need to watch for ambiguities, inconsistencies, errors, and deficiencies which should be surfaced during the evaluation process;

(6) An explanation of the evaluation process and what will be expected of the evaluators throughout the process;

(7) The need for the evaluators to be aware of the requirement to have complete written documentation of the individual strengths and weaknesses which affect the scoring of the proposals; and

(8) An instruction directing the evaluators that, until the award is made, information concerning the acquisition must not be disclosed to any person not directly involved in the evaluation process.

[50 FR 23131, May 31, 1985, and 50 FR 38004, Sept. 19, 1985]

**315.608-75 Rating and ranking of proposals.**

The evaluators will individually read each proposal, describe tentative strengths and weaknesses, and develop preliminary scores in relation to each evaluation criterion set forth in the solicitation. The evaluators will use the rating sheets either in the technical evaluation plan or approved by the contracting officer when a technical evaluation plan is not required (see 315.608-70). After this has been accomplished, the evaluators shall discuss in detail the individual strengths and weaknesses described by each evaluator and, if possible, arrive at a common understanding of the major strengths and weaknesses and the potential for correcting each offeror's weakness(es). Each evaluator will score each proposal, and then the technical evaluation panel will collectively rank the proposals. Generally, ranking will be determined by adding the numerical scores assigned to the evaluation criteria and finding the average for each offeror. The evaluators should then identify whether each proposal is acceptable or unacceptable. Predetermined cutoff scores shall not be employed.

[50 FR 23131, May 31, 1985, and 50 FR 38004, Sept. 19, 1985]

**315.608-76 Technical evaluation report.**

A technical evaluation report shall be prepared and furnished to the contracting officer by the chairperson and maintained as a permanent record in the contract file. The report must reflect the ranking of the proposals and identify each proposal as acceptable or unacceptable in accordance with 315.608-75. The report must also include a narrative evaluation specifying the strengths and weaknesses of each proposal, a copy of each rating sheet, and any reservations, qualifications, or areas to be addressed that might bear upon the selection of sources for negotiation and award. Concrete technical reasons supporting a determination of unacceptability with regard to any proposal must be included. The report should also include specific points and

questions which are to be raised in discussions or negotiations.

[50 FR 23132, May 31, 1985, and 50 FR 38004, Sept. 19, 1985]

**315.608-77 Evaluation of business proposals.**

(a) The contracting officer shall evaluate the business proposals concurrently with the evaluation of the technical proposals. The contracting officer must adhere to the requirements for cost or price analysis included in FAR 15.805-1 for each business proposal in the competitive range. An audit report may be required in accordance with FAR 15.805-5 and 315.805-5. The contracting officer must determine the extent of analysis in each case depending on the amount of the proposal, the technical complexity and related cost or price, and cost realism. The contracting officer should request the project officer to analyze such items as the number of labor hours proposed for various labor categories; the mix of labor hours and categories of labor in relation to the technical requirements of the project; the kinds and quantities of material, equipment, and supplies; types, numbers, and hours/days of proposed consultants; logic of proposed subcontracting; analysis of the travel proposed including number of trips, locations, purpose, and travelers; and kinds and quantities of data processing. The project officer shall provide his/her opinion as to whether these elements are necessary and reasonable for efficient contract performance. Exceptions to proposed elements shall be supported by adequate rationale to allow for effective negotiations. The contracting officer should also request the assistance of a cost/price analyst when considered necessary. In all cases, the negotiation memorandum (see 315.672) must include the rationale used in determining that the price or cost is fair and reasonable.

(b) The contracting officer must appraise the management capability of the offeror to perform the required work in a timely manner. In making this appraisal, the contracting officer should consider factors such as the offeror's management organization,

past performance, reputation for reliability, availability of the required facilities, and cost controls. This information is to be used by the contracting officer to determine the offeror's responsibility.

[50 FR 23132, May 31, 1975, and 50 FR 38004, Sept. 19, 1985]

### **315.609 Competitive range.**

(a) A proposal must be included in the competitive range unless there is no real possibility that it can be improved to the point where it becomes the *most* acceptable.

(e) In certain circumstances, when deciding which proposals should be included in the competitive range, the contracting officer may request that the technical evaluation panel review the cost or price data. Typical situations which may necessitate this review include a suspected "buy-in," large differences in cost or price among the proposals, proposals receiving high technical ratings which have relatively high costs, and proposals receiving low technical ratings which have relatively low costs. The resultant comparison of cost or price to technical factors and the determination of cost or price realism should assist the contracting officer in deciding which proposals are to be included in the competitive range.

(f) All determinations regarding the inclusion or exclusion of proposals in the competitive range must be completely documented, including the salient reasons for the determinations, and set forth in the negotiation memorandum.

(g) Some of the factors which the contracting officer should consider in determining the competitive range are:

(1) The relative importance of cost or price as compared to technical factors in accordance with the solicitation provisions required in 315.406-5(c);

(2) The susceptibility of significantly reducing a proposal with an unreasonable high price or cost without undermining the technical merit if the offeror otherwise has a reasonable chance to receive an award; and

(3) The likelihood of reducing cost or price of a proposal which exceeds the Government's requirements.

(h) The contacting officer shall conduct a thorough review of the technical evaluation report to be assured that:

(1) All determinations of unacceptability are supported by concrete and comprehensive statements that are factual and convincing and are consistent with the evaluation criteria set forth in the solicitation. Every statement should be reviewed carefully to eliminate any doubts as to the unacceptability of a proposal;

(2) All recommendations to exclude proposals from the competitive range are supported by persuasive rationale and sufficient facts to substantiate a judgment that meaningful discussions are not possible or there is no reasonable chance of the proposal being selected for award;

(3) Those cases where only one organization is found to be technically acceptable are fully scrutinized; and

(4) Unacceptable proposals contain "information" deficiencies which are so material as to preclude any possibility of upgrading the proposal to a competitive level except through major revisions and additions which would be tantamount to the submission of another proposal.

(i) The contracting officer and project officer should discuss the uncertainties and/or deficiencies that are included in the technical evaluation report for each proposal in the competitive range. Technical questions should be developed by the project officer and/or the technical evaluation panel and should be included in the technical evaluation report. The management and cost or price questions should be prepared by the contracting officer with assistance from the project officer and/or panel as required. The method of requesting offerors in the competitive range to submit the additional information will vary depending on the complexity of the questions, the extent of additional information requested, the time needed to analyze the responses, and the time frame for making the award. However, to the extent practicable, all questions and answers should be in writing. Each offeror in the competitive range shall be given an equitable period of time for preparation of responses to questions to the extent practicable. The questions

should be developed so as to disclose the ambiguities, uncertainties, and deficiencies of the offeror (see FAR 15.610(c)).

**315.610 Written or oral discussions.**

(b) The contracting officer, with the support of personnel who evaluated the technical proposals, and, if necessary, cost analysts, attorneys, etc., must conduct written or oral discussions with all responsible offerors within the competitive range.

(d) Careful judgment must be exercised in determining the extent of discussions. In some cases, more than one round of discussions with all the offerors within the competitive range may be required. The time available, the expense and administrative limitations, and the complexity, size, and significance of the acquisition should all be considered in deciding on the type, duration, and depth of the discussions.

**315.611 Best and final offers.**

(b)(5) Notice that confirmation of a prior offer should be specifically stated as a final offer; and

(6) Notice that all revisions to former offers should be submitted on Standard Form 1411, Contract Pricing Proposal Cover Sheet, and should be fully documented.

(c) "Best and final" offers are subject to a final evaluation of price or cost and other salient factors by the contracting officer and project officer with assistance from a cost/price analyst, and an evaluation of technical factors by the technical evaluation panel, as necessary. Proposals may be technically rescored and reranked by the technical evaluation panel and a technical evaluation report prepared. To the extent practicable, the evaluation shall be performed by the same evaluators who reviewed the original proposals (see 315.670—).

(e) Of particular importance in the award of research or development contracts, including those with educational institutions, is the competence of key personnel in the specific field of science or technology involved, as reflected in the proposal. However, awards should not be made for research and development capabilities that ex-

ceed those needed for the successful performance of the particular project.

**315.670 Negotiation with the selected source.**

(a) After selection of the successful proposal, a limited negotiation with the selected offeror may be conducted if deemed necessary. However, no factor which could have any effect on the selection process may be introduced into the negotiation after the common cutoff date for receipt of best and final offers. The negotiation shall not in any way prejudice the competitive interests or right of the unsuccessful offerors. Negotiations with the selected offeror shall be restricted to definitizing the final agreement on terms and conditions; e.g., assuming none of these factors were involved in the selection process, negotiation could include such topics as payment provisions, patent rights, rights in data, property provisions, labor rates, indirect cost rates, and fees. Prior to conducting the limited negotiation, the contracting officer shall approve a written determination citing both the specific issues to be discussed and the rationale showing that the negotiations shall not have any effect on the selection process.

(b) Caution must be exercised by the contracting officer to insure that the negotiation is not used to change the requirement contained in the solicitation, nor to make any other changes which would impact on the source selection decision. Whenever a material change occurs in the requirements as a result of the negotiation, the competition must be reopened and all offerors submitting "best and final" offers must be given an opportunity to resubmit proposals based on the revised requirements. Whenever there is a question as to whether a change is material, the contracting officer should obtain the advice of technical personnel and legal counsel before reopening the competition. Significant changes in the offeror's cost proposal may also necessitate a reopening of competition if such changes alter the factors involved in the original selection process.

(c) Should negotiations beyond those specified in (a) above be required for

any reason, discussions must be reopened with all offerors submitting “best and final” offers.

(d) Upon completion of the negotiation, the contracting officer shall obtain a confirmation letter from the successful offeror which includes any revisions to the technical proposal, the agreed to price or cost, and, as applicable, a certificate of current cost or pricing data.

[49 FR 13979, Apr. 9, 1984, 49 FR 36110, Sept. 14, 1984]

**315.671 Post negotiation contract preparation and award.**

(a) The contracting officer must perform the following actions after negotiations have been completed:

(1) Prepare the negotiation memorandum in accordance with 315.672;

(2) Prepare the contract containing all agreed to terms and conditions and clauses required by law or regulation;

(3) Include in the contract file the pertinent documents referenced in FAR 4.803; and

(4) Obtain the appropriate approval of proposed contract awards in accordance with Subpart 304.71 and contracting activity procedures.

(b) After receiving the required approvals, the contract should be transmitted to the prospective contractor for signature. The prospective contractor must be informed that the contract is not effective until accepted by the contracting officer.

(c) The contract shall not be issued until the finance office certifies that the funds are available for obligation.

**315.672 Preparation of negotiation memorandum.**

The negotiation memorandum or summary of negotiations is a complete record of all actions leading to award of a contract and is prepared by the contract negotiator. It should be in sufficient detail to explain and support the rationale judgments, and authorities upon which all actions were predicated. The memorandum will document the negotiation process and reflect the negotiator's actions, skills, and judgments in concluding a satisfactory agreement for the Government. Negotiation memorandums shall contain discussion of the following or a

statement of nonapplicability; however, information already contained in the contract file need not be reiterated. A reference to the document which contains the required information is satisfactory.

(a) *Description of articles and services and period of performance.* A description of articles and services, quantity, unit price, total contract amount, and period of contract performance should be set forth (if Supplemental Agreement—show previous contract amount as revised, as well as information with respect to the period of performance).

(b) *Acquisition planning.* Summarize any acquisition planning activities that have taken place. Include items such as meetings with program and staff personnel and the development of acquisition planning schedules.

(c) *Synopsis of proposed acquisition.* A statement as to whether the acquisition has or has not been publicized in accordance with FAR Subpart 5.2. A brief statement of explanation should be included with reference to the specific basis for exemption under the FAR, if applicable.

(d) *Contract type.* Provide sufficient detail to support the type of contractual instrument recommended for the acquisition and cite any required D & F. If the contract is a cost-sharing type, explain the essential cost-sharing features.

(e) *Extent of competition.* The extent to which full and open competition was solicited and obtained must be discussed. The discussion shall include the date of solicitation, sources solicited, and solicitation results. If a late proposal was received, discuss whether or not the late proposal was evaluated and the rationale for the decision. If the acquisition is to be awarded without full and open competition, discuss the rationale for the decision.

(f) *Technical evaluation.* Summarize the results presented in the technical evaluation report and delineate the basis of acceptability or unacceptability of the proposals from a technical standpoint. Discussion should be in nontechnical terms.

(g) *Business evaluation.* Summarize the results presented in the business report and delineate the basis for the determination of acceptability or

unacceptability of the business proposals.

(h) *Competitive range.* If full and open competition, describe how the zone of consideration or competitive range was determined and state the offerors who were included in the competitive range and the ones who were not. Explain why any offeror who submitted a technically acceptable proposal was not included in further discussions. Comment on any changes made in the offeror's proposal as a result of the discussions.

(i) *Cost breakdown and analysis.* Include a complete cost breakdown together with the negotiator's analysis of the estimated cost by individual cost elements. The negotiator's analysis should contain such information as:

(1) A comparison of cost factors proposed in the instant case with actual cost factors used in earlier contracts, using the same cost centers of the same supplier or cost centers or other sources having recent contracts for the same or similar item.

(2) Any pertinent Government-conducted audit of the proposed contractor's records of any pertinent cost advisory report (see FAR 15.805).

(3) Any pertinent technical evaluation inputs as to necessity, allocability and reasonableness of labor, material and other direct expenses.

(4) Any other pertinent information to fully support the basis for and rationale of the cost analysis.

(5) If the contract is an incentive type, discuss the rationale for the following:

(i) Cost-plus-award-fee.

(A) Base fee.

(B) Maximum fee.

(C) Award fee.

(ii) Cost-plus-incentive-fee.

(A) Minimum fee.

(B) Target fee.

(C) Maximum fee.

(D) Incentives relative to performance and/or delivery.

(E) Sharing ratios.

(iii) Fixed-price incentives.

(A) Target profit.

(B) Target price.

(C) Ceiling price.

(D) Sharing ratios.

(E) Incentives relative to performance and/or delivery.

(6) A justification of the reasonableness of the proposed contractor's estimated profit or fixed fee, considering such factors as any competitive elements, established efficiency or performance, extent of the risk assumed by the proposed contractor, character of the proposed contractor's normal business, the extent of subcontracting in the instant case and the reasons, capital employed, and other factors as are appropriate, including type of organization.

(j) *Government-furnished property and Government-provided facilities.* With respect to Government-furnished material or Government-provided facilities, equipment, tooling, or other property, include the following: (A separate D & F is required for facilities construction.)

(1) Where no property is to be provided, a statement to that effect.

(2) Where property is to be provided, a full description, the estimated dollar value, the basis of price comparison with competitors, and the basis of rental charge, if rental is involved.

(3) Where the furnishing of any property or the extent has not been determined and is left open for future resolution, a detailed explanation.

(k) *Negotiations.* Include a statement as to the date and place negotiations were conducted, and identify members of both the Government and contractor negotiating teams by area of responsibility. Include negotiation details relative to the statement of work, terms and conditions, and special provisions. The results of cost or price negotiations must include the information required by FAR 31.109 and 15.808. In addition, if cost or pricing data was required to be submitted and certified, the negotiation record must also contain the extent to which the contracting officer relied upon the factual cost or pricing data submitted and used in negotiating the cost or price.

(l) *Other considerations.* Include coverage of areas such as:

(1) Financial data with respect to a contractor's capacity and stability.

(2) Determination of contractor responsibility.

(3) Details as to why the method of payment, such as progress payment,

advance payment, etc., is necessary. Also cite any required D & F's.

(4) Information with respect to obtaining of a certificate of current cost or pricing data.

(5) Other required special approvals, such as those referenced in 307.105-2.

(6) If the contract represents an extension of previous work, the status of funds and performance under the prior contract(s) should be reflected. Also, a determination should be made that the Government has obtained enough actual or potential value from the work previously performed to warrant continuation with the same contractor. (Project officer should furnish the necessary information.)

(7) If the contract was awarded by full and open competition state where the unsuccessful offerors' proposals are filed.

(8) State that equal opportunity provisions of the proposed contract have been explained to the contractor, and it is aware of its responsibilities. Also state whether or not a clearance is required.

(9) If the contract is for services, a statement must be made, in accordance with FAR 37.103 and 337.103, that the services to be acquired are nonpersonal in nature.

(m) *Terms and conditions.* Identify the general provisions and any special clauses and conditions that are contained in the contract, such as option arrangements, incremental funding, anticipatory costs, deviations from the standard clauses, etc. The basis and rationale for inclusion of any special terms and conditions must be stated and, where applicable, the document which granted approval for its use identified.

(n) *Recommendation.* A brief statement setting forth the recommendations for award.

(o) *Signature.* The memorandum must be signed by the contract negotiator who prepared the memorandum.

[49 FR 13979, Apr. 9, 1984, as amended at 50 FR 23132, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

## Subpart 315.8—Price Negotiation

### 315.804 Cost or pricing data.

#### 315.804-3 Exemptions from or waiver of submission of certified cost or pricing data.

(i) *Waiver for exceptional cases.* The authority referenced in FAR 15.804-3(i) may be delegated to the principal official responsible for acquisition.

[51 FR 44294, Dec. 9, 1986]

### 315.805 Proposal analysis.

#### 315.805-5 Field pricing support.

(2) When some or all information sufficient to determine the reasonableness of the proposed cost or price is already available or can be obtained by phone from the cognizant audit agency, contracting officers may request less-than-complete field pricing support (specifying in the request the information needed) or may waive in writing the requirement for audit and field pricing support by documenting the file to indicate what information is to be used instead of the audit report and the field pricing report.

(c)(1) When initiating audit and field pricing support, the contracting officer shall do so by sending a request to the cognizant administrative contracting officer (ACO), with an information copy to the cognizant audit office. When field pricing support is not available, the contracting officer shall initiate an audit by sending, in accordance with agency procedures, two (2) copies of the request to the OIG Office of Audits' Regional Audit Director. In both cases, the contracting officer shall, in the request:

(i) Prescribe the extent of the support needed;

(ii) State the specific areas for which input is required;

(iii) Include the information necessary to perform the review (such as the offeror's proposal and the applicable portions of the solicitations, particularly those describing requirements and delivery schedules);

(iv) Provide the complete address of the location of the offeror's financial records that support the proposal;

(v) Identify the office having audit responsibility if other than an HHS Regional Audit Office; and

(vi) Specify a due date for receipt of a verbal report to be followed by a written audit report. (If the time available is not adequate to permit satisfactory coverage of the proposal, the auditor shall so advise the contracting officer and indicate the additional time needed.) Normally, the Office of Audits will need 30 days after receipt of the proposal for submission of oral results. However, the Office of Audits' ability to conduct reviews by the due date will be influenced by the OPDIV's ability to properly plan its acquisitions. If the Office of Audits requires additional time to conduct the review, the contracting officer has the option, at the time the auditor acknowledges receipt of the request, to accept the revised due date or cancel the request and use cost advisory services within the agency to satisfy the requirement. In such cases, the contracting officer shall immediately advise the OIG/OA/Regional Audit Director and the OIG/OA/Division of Audit Coordination (OIG/OA/DAC) of the revised due date or cancellation of the request.

(4) One copy of the audit request letter that was submitted to the Regional Audit Director and a complete copy of the contract price proposal shall be submitted to OIG/OA/DAC.

(5) Whenever, an audit review has been conducted by the Office of Audits, two (2) copies of the memorandum of negotiation shall be forwarded to OIG/OA/DAC by the contracting officer (see FAR 15.808(b)).

### Subpart 315.9—Profit

#### 315.900 Scope of subpart.

This subpart—

(c) Prescribes a structured approach for establishing the profit or fee portion of the Government prenegotiation objective in all contracts requiring cost analysis except as stated in 315.905-70(b). The profit analysis factors set forth at FAR 15.905 shall be used in all excepted contracts requiring cost analysis.

#### 315.905-70 Structured approach.

(a) *General.* (1) The structured approach for determining profit or fee (hereafter referred to as profit) provides contracting officers with a technique that will ensure consideration of the relative value of the appropriate profit factors described in 315.905-71 in the establishment of a profit objective for the conduct of negotiations. The contracting officer's analysis of these profit factors is based on information available to him/her prior to negotiations. Such information is furnished in proposals, audit data, assessment reports, preaward surveys and the like. The structured approach also provides a basis for documentation of this objective, including an explanation of any significant departure from this objective in reaching an agreement. The extent of documentation should be directly related to the dollar value and complexity of the proposed acquisition.

(2) The negotiation process does not require agreement on either estimated cost elements or profit elements. The profit objective is a part of an overall negotiation objective which, as a going-in objective, bears a distinct relationship to the cost objective and any proposed sharing arrangement. Since profit is merely one of several interrelated variables, the Government negotiator generally should not complete the profit negotiation without simultaneously agreeing on the other variables. Specific agreement on the exact weights or values of the individual profit factors is not required and should not be attempted.

(b) *Exceptions.* (1) The profit-analysis factors set forth at FAR 15.905 shall be used for establishing profit objectives under the following listed circumstances. Generally, it is expected that this method will be supported in a manner similar to that used in the structured approach (profit factor breakdown and documentation of the profit objective); however, factors within FAR 15.905 considered inapplicable to the acquisition will be excluded from the profit objective.

(i) Contracts not expected to exceed \$100,000;

(ii) Architect-engineer contracts;

(iii) Management contracts for operation and/or maintenance of Government facilities;

(iv) Construction contracts;

(v) Contracts primarily requiring delivery of material supplies by subcontractors;

(vi) Termination settlements; and

(vii) Cost-plus-award-fee contracts (However, contracting officers may find it advantageous to perform a structured profit analysis as an aid in arriving at an appropriate fee arrangement).

(2) Other exceptions may be made in the negotiation of contracts having unusual pricing situations. Such exceptions shall be justified in writing by the contracting officer in situations where the structured approach is determined to be unsuitable.

(c) *Limitation.* The maximum profit objective shall be the percentage allowed pursuant to statute or regulation (see FAR 15.903(d)).

(d) *Profit objective.* (1) A profit objective is that part of the estimated contract price objective or value which, in the judgment of the contracting officer, constitutes an appropriate amount of profit for the acquisition being considered. This objective should realistically reflect the total overall task to be performed and the requirements placed on the contractor.

(2) Development of a profit objective should not begin until the following actions have been accomplished:

(i) A thorough review of proposed contract work;

(ii) A review of all available knowledge regarding the contractor pursuant to FAR Subpart 9.1, including audit data, preaward survey reports and financial statements, as appropriate; and

(iii) An analysis of the contractor's cost estimate and comparison with the Government's estimate or projection of cost.

### 315.905-71 Profit factors.

(a) The following factors shall be considered in all cases in which profit is to be negotiated. The weight ranges listed after each factor shall be used in all instances where the structured approach is used.

Profit factors	Weight ranges (percent)
Contractor effort:	
Material acquisition .....	1 to 5
Direct labor .....	4 to 15
Overhead .....	4 to 9
General management (G&A) .....	4 to 8
Other costs .....	1 to 5
Other factors:	
Cost risk .....	0 to 7
Investment .....	-2 to +2
Performance .....	-1 to +1
Socioeconomic programs .....	-.5 to +.5
Special situations .....	

(b) Under the structured approach, the contracting officer shall first measure "Contractor Effort" by the assignment of a profit percentage within the designated weight ranges to each element of contract cost recognized by the contracting officer. The amount calculated for the cost of money for facilities capital is not to be included for the computation of profit as part of the cost base.

(c) The suggested categories under "Contractor Effort" are for reference purposes only. Often individual proposals will be in a different format, but since these categories are broad and basic, they provide sufficient guidance to evaluate all other items of cost.

(d) After computing a total dollar profit for "Contractor Effort," the contracting officer shall then calculate the specific profit dollars assigned for cost risk, investment, performance, socioeconomic programs, and special situations. This is accomplished by multiplying the total Government Cost Objective, exclusive of any cost of money for facilities capital, by the specific weight assigned to the elements within the "Other Factors" category. Form HHS-674, Structured Approach Profit/Fee Objective, should be used, as appropriate, to facilitate the calculation of this profit objective. Form HHS-674 is illustrated in 353.370-674.

(e) In making a judgment of the value of each factor, the contracting officer should be governed by the definition, description, and purpose of the factors together with considerations for evaluating them as set forth in 315.905-72 and 315.905-73.

(f) The structured approach was designed for arriving at profit objectives for other than nonprofit organizations. However, if appropriate adjustments

are made to reflect differences between profit and nonprofit organizations, the structured approach can be used as a basis for arriving at profit objectives for nonprofit organizations. Therefore, the structured approach, as modified in paragraph (f)(2) below, shall be used to establish profit objectives for nonprofit organizations.

(1) For purposes of this section, nonprofit organizations are defined as those business entities organized and operated exclusively for charitable, scientific, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual, and which are exempt from Federal income taxation under Section 501 of the Internal Revenue Code.

(2) For contracts with nonprofit organizations where profit is involved, an adjustment of up to 3 percentage points will be subtracted from the total profit objective percentage. In developing this adjustment, it will be necessary to consider the following factors:

- (i) Tax position benefits;
- (ii) Granting of financing through advance payments; and
- (iii) Other pertinent factors which may work to either the advantage or disadvantage of the contractor in its position as a nonprofit organization.

[49 FR 13979, Apr. 9, 1984, as amended at 53 FR 15563, May 2, 1988; 56 FR 47003, Sept. 17, 1991]

### **315.905-72 Contractor effort.**

(a) *General.* Contractor effort is a measure of how much the contractor is expected to contribute to the overall effort necessary to meet the contract performance requirement in an efficient manner. This factor, which is apart from the contractor's responsibility for contract performance, takes into account what resources are necessary and what the contractor must do to accomplish a conversion of ideas and material into the final service or product called for in the contract. This is a recognition that within a given performance output, or within a given sales dollar figure, necessary efforts on the part of individual contractors can vary widely in both value and quantity, and that the profit objective should reflect the extent and na-

ture of the contractor's contribution to total performance. A major consideration, particularly in connection with experimental, developmental, or research work, is the difficulty or complexity of the work to be performed, and the unusual demands of the contract, such as whether the project involves a new approach unrelated to existing technology and/or equipment or only refinements to these items. The evaluation of this factor requires an analysis of the cost content of the proposed contract as follows:

(1) *Material acquisition.* (Subcontracted items, purchased parts, and other material.) Analysis of these cost items shall include an evaluation of the managerial and technical effort necessary to obtain the required subcontracted items, purchased parts, material or services. The contracting officer shall determine whether the contractor will obtain the items or services by routine order from readily available sources or by detailed subcontracts for which the prime contractor will be required to develop complex specifications. Consideration shall also be given to the managerial and technical efforts necessary for the prime contractor to select subcontractors and to perform subcontract administration functions. In application of this criterion, it should be recognized that the contribution of the prime contractor to its purchasing program may be substantial. Normally, the lowest unadjusted weight for direct material is 2 percent. A weighting of less than 2 percent would be appropriate only in unusual circumstances when there is a minimal contribution by the contractor.

(2) *Direct Labor* (Professional, service, manufacturing and other labor). Analysis of the various labor categories of the cost content of the contract should include evaluation of the comparative quality and quantity of professional and semiprofessional talents, manufacturing and service skills, and experience to be employed. In evaluating professional and semiprofessional labor for the purpose of assigning profit dollars, consideration should be given to the amount of notable scientific talent or

unusual or scarce talent needed in contrast to nonprofessional effort. The assessment should consider the contribution this talent will provide toward the achievement of contract objectives. Since nonprofessional labor is relatively plentiful and rather easily obtained by the contractor and is less critical to the successful performance of contract objectives, it cannot be weighted nearly as high as professional or semiprofessional labor. Service contract labor should be evaluated in a like manner by assigning higher weights to engineering or professional type skills and lower weights to semiprofessional or other type skills required for contract performance. Similarly, the variety of manufacturing and other categories of labor skills required and the contractor's manpower resources for meeting these requirements should be considered. For purposes of evaluation, categories of labor (i.e., quality control, receiving and inspection, etc.) which do not fall within the definition for professional, service or manufacturing labor may be categorized as appropriate. However, the same evaluation considerations as outlined above will be applied.

(3) *Overhead and general management (G&A).* (i) Analysis of these overhead items of cost should include the evaluation of the makeup of these expenses and how much they contribute to contract performance. To the extent practicable, analysis should include a determination of the amount of labor within these overhead pools and how this labor would be treated if it were considered as direct labor under the contract. The allocable labor elements should be given the same profit considerations that they would receive if they were treated as direct labor. The other elements of these overhead pools should be evaluated to determine whether they are routine expenses, such as utilities and maintenance, and hence given lesser profit consideration, or whether they are significant contributing elements. The composite of the individual determinations in relation to the elements of the overhead pools will be the profit consideration given the pools as a whole. The procedure for assigning relative values to these overhead expenses differs from

the method used in assigning values of the direct labor. The upper and lower limits assignable to the direct labor are absolute. In the case of overhead expenses, individual expenses may be assigned values outside the range as long as the composite ratio is within the range.

(ii) It is not necessary that the contractor's accounting system break down overhead expenses within the classifications of research overhead, other overhead pools, and general administrative expenses, unless dictated otherwise by Cost Accounting Standards (CAS). The contractor whose accounting system reflects only one overhead rate on all direct labor need not change its system (if CAS exempt) to correspond with the above classifications. The contracting officer, in an evaluation of such a contractor's overhead rate, could break out the applicable sections of the composite rate which could be classified as research overhead, other overhead pools, and general and administrative expenses, and follow the appropriate evaluation technique.

(iii) Management problems surface in various degrees and the management expertise exercised to solve them should be considered as an element of profit. For example, a contract for a new program for research or an item which is on the cutting edge of the state of the art will cause more problems and require more managerial time and abilities of a higher order than a follow-on contract. If new contracts create more problems and require a higher profit weight, follow-ons should be adjusted downward because many of the problems should have been solved. In any event, an evaluation should be made of the underlying managerial effort involved on a case-by-case basis.

(iv) It may not be necessary for the contracting officer to make a separate profit evaluation of overhead expenses in connection with each acquisition action for substantially the same project with the same contractor. Where an analysis of the profit weight to be assigned to the overhead pool has been made, that weight assigned may be used for future acquisitions with the same contractor until there is a change in the cost composition of the overhead

pool or the contract circumstances, or the factors discussed in (iii) above are involved.

(b) *Other costs.* Analysis of this factor should include all other direct costs associated with contractor performance (e.g., travel and relocation, direct support, and consultants). Analysis of these items of cost should include:

(1) The significance of the cost of contract performance;

(2) Nature of the cost; and

(3) How much they contribute to contract performance. Normally, travel costs require minimal administrative effort by the contractor and, therefore, usually receive a weight no greater than 1 percent. Also, the contractor may designate individuals as "consultants" but in reality these individuals may be obtained by the contractor to supplement its workforce in the performance of routine duties required by contract. These costs would normally receive a minimum weight. However, there will be instances when the contractor may be required to locate and obtain the services of consultants having expertise in such fields as medicine or human services. In these instances, the contractor will be required to expend greater managerial and technical effort to obtain such services and, consequently, such costs should receive a much greater weight.

### **315.905-73 Other factors.**

(a) *Contract cost risk.* The contract type employed basically determines the degree of cost risk assumed by the contractor. For example, where a portion of the risk has been shifted to the Government through cost-reimbursement provisions, unusual contingency provisions, or other risk-reducing measures, the amount of profit should be less than where the contractor assumes all the risk. In developing the prenegotiation profit objective, the contracting officer will need to consider the type of contract anticipated to be negotiated and the contractor risk associated therewith when selecting the position in the weight range for profit that is appropriate for the risk to be borne by the contractor. This factor should be one of the most important in arriving at prenegotiation profit objectives.

(1) Evaluation of this risk requires a determination of:

(i) The degree of cost responsibility the contractor assumes;

(ii) The reliability of the cost estimates in relation to the task assumed; and

(iii) The complexity of the task assumed by the contractor. This factor is specifically limited to the risk of contract costs. Thus, such risks on the part of the contractor as reputation, losing a commercial market, risk of losing potential profits in other fields, or any risk which falls on the contracting office such as the risk of not acquiring a satisfactory report, are not within the scope of this factor.

(2) The first and basic determination of the degree of cost responsibility assumed by the contractor is related to the sharing of total risk of contract cost by the Government and the contractor through the selection of contract type. The extremes are a cost-plus-a-fixed-fee contract requiring the contractor to use its best efforts to perform a task and a firm fixed-price contract for a service or a complex item. A cost-plus-a-fixed-fee contract would reflect a minimum assumption of cost responsibility, whereas a firm fixed-price contract would reflect a complete assumption of cost responsibility. Where proper contract selection has been made, the regard for risk by contract type would usually fall into the following percentage ranges:

#### *Percent*

Cost-reimbursement type contracts—0-3

Fixed-price type contracts—2-7

(3) The second determination is that of the reliability of the cost estimates. Sound price negotiation requires well-defined contract objectives and reliable cost estimates. Prior experience assists the contractor in preparing reliable cost estimates on new acquisitions for similar related efforts. An excessive cost estimate reduces the possibility that the cost of performance will exceed the contract price, thereby reducing the contractor's assumption of contract cost risk.

(4) The third determination is that of the difficulty of the contractor's task. The contractor's task can be difficult

or easy, regardless of the type of contract.

(5) Contractors are likely to assume greater cost risk only if contracting officers objectively analyze the risk incident to proposed contracts and are willing to compensate contractors for it. Generally, a cost-plus-fixed fee contract will not justify a reward for risk in excess of 0.5 percent, nor will a firm fixed-price contract justify a reward of less than the minimum in the structured approach. Where proper contract-type selection has been made, the reward for risk, by contract type, will usually fall into the following percentage ranges:

(i) Type of contract and percentage ranges for profit objectives developed by using the structured approach for research and development and manufacturing contracts:

*Percent*

Cost-plus-fixed fee—0 to 0.5

Cost-plus-incentive fee:

With cost incentive only—1 to 2

With multiple incentives—1.5 to 2

Fixed-price-incentive:

With cost incentive only—2 to 4

With multiple incentives—3 to 5

Prospective price redetermination—3 to 5

Firm fixed-price—5 to 7

(ii) Type of contract and percentage ranges for profit objectives developed by using the structured approach for service contracts:

*Percent*

Cost-plus-fixed fee—0 to 0.5

Cost-plus-incentive fee—1 to 2

Fixed-price incentive—2 to 3

Firm fixed-price—3 to 4

(6) These ranges may not be appropriate for all acquisitions. For instance, a fixed-price-incentive contract that is closely priced with a low ceiling price and high incentive share may be tantamount to a firm fixed-price contract. In this situation, the contracting officer may determine that a basis exists for high confidence in the reasonableness of the estimate and that little opportunity exists for cost reduction without extraordinary efforts. On the other hand, a contract with a high ceiling and low incentive formula can be considered to contain cost-plus-incentive-fee contract features. In this situation, the contracting officer may de-

termine that the Government is retaining much of the contract cost responsibility and that the risk assumed by the contractor is minimal. Similarly, if a cost-plus-incentive-fee contract includes an unlimited downward (negative) fee adjustment on cost control, it could be comparable to a fixed-price-incentive contract. In such a pricing environment, the contracting officer may determine that the Government has transferred a greater amount of cost responsibility to the contractor than is typical under a normal cost-plus-incentive-fee contract.

(7) The contractor's subcontracting program may have a significant impact on the contractor's acceptance of risk under a contract form. It could cause risk to increase or decrease in terms of both cost and performance. This consideration should be a part of the contracting officer's overall evaluation in selecting a factor to apply for cost risk. It may be determined, for instance, that the prime contractor has effectively transferred real cost risk to a subcontractor and the contract cost risk evaluation may, as a result, be below the range which would otherwise apply for the contract type being proposed. The contract cost risk evaluation should not be lowered, however, merely on the basis that a substantial portion of the contract costs represents subcontracts without any substantial transfer of contractor's risk.

(8) In making a contract cost risk evaluation in an acquisition action that involves definitization of a letter contract, unpriced change orders, and unpriced orders under BOA's, consideration should be given to the effect on total contract cost risk as a result of having partial performance before definitization. Under some circumstances it may be reasoned that the total amount of cost risk has been effectively reduced. Under other circumstances it may be apparent that the contractor's cost risk remained substantially unchanged. To be equitable, the determination of profit weight for application to the total of all recognized costs, both those incurred and those yet to be expended, must be made with consideration to all attendant circumstances—not just the portion of costs incurred or percentage

of work completed prior to definitization.

(9) Time and material and labor hour contracts will be considered to be cost-plus-a-fixed-fee contracts for the purpose of establishing profit weights unless otherwise exempt under 315.905-70(b) in the evaluation of the contractor's assumption of contract cost risk.

(b) *Investment.* HHS encourages its contractors to perform their contracts with the minimum of financial, facilities, or other assistance from the Government. As such, it is the purpose of this factor to encourage the contractor to acquire and use its own resources to the maximum extent possible. The evaluation of this factor should include an analysis of the following:

(1) *Facilities* (Including equipment). To evaluate how this factor contributes to the profit objective requires knowledge of the level of facilities utilization needed for contract performance, the source and financing of the required facilities, and the overall cost effectiveness of the facilities offered. Contractors who furnish their own facilities which significantly contribute to lower total contract costs should be provided with additional profit. On the other hand, contractors who rely on the Government to provide or finance needed facilities should receive a corresponding reduction in profit. Cases between the above examples should be evaluated on their merits with either positive or negative adjustments, as appropriate, in profit being made. However, where a highly facilitized contractor is to perform a contract which does not benefit from this facilitization or where a contractor's use of its facilities has a minimum cost impact on the contract, profit need not be adjusted. When applicable, the prospective contractor's computation of facilities capital cost of money for pricing purposes under CAS 414 can help the contracting officer identify the level of facilities investment to be employed in contract performance.

(2) *Payments.* In analyzing this factor, consideration should be given to the frequency of payments by the Government to the contractor. The key to this weighting is to give proper consideration to the impact the contract will have on the contractor's cash flow.

Generally, negative consideration should be given for advance payments and payments more frequent than monthly with maximum reduction being given as the contractor's working capital approaches zero. Positive consideration should be given for payments less frequent than monthly with additional consideration given for a capital turn-over-rate on the contract which is less than the contractor's or the industry's normal capital turn-over rate.

(c) *Performance.* (Cost-control and other past accomplishments.) The contractor's past performance should be evaluated in such areas as quality of service or product, meeting performance schedules, efficiency in cost control (including need for and reasonableness of cost incurred), accuracy and reliability of previous cost estimates, degree of cooperation by the contractor (both business and technical), timely processing of changes and compliance with other contractual provisions, and management of subcontract programs. Where a contractor has consistently achieved excellent results in the foregoing areas in comparison with other contractors in similar circumstances, such performance merits a proportionately greater opportunity for profit. Conversely a poor record in this regard should be reflected in determining what constitutes a fair and reasonable profit.

(d) *Federal socioeconomic programs.* This factor, which may apply to special circumstances or particular acquisitions, relates to the extent of a contractor's successful participation in the Government sponsored programs such as small business, small disadvantaged business, labor surplus area, and energy conservation efforts. The contractor's policies and procedures which energetically support Government socioeconomic programs and achieve successful results should be given positive considerations. Conversely, failure or unwillingness on the part of the contractor to support Government socioeconomic programs should be viewed as evidence of poor performance for the purpose of establishing a profit objective.

(e) *Special situations.* (1) *Inventive and developmental contributions.* The extent

and nature of contractor-initiated and financed independent development should be considered in developing the profit objective, provided that the contracting officer has made a determination that such effort will benefit the contract. The importance of the development in furthering health and human services purposes, the demonstrable initiative in determining the need and application of the development, the extent of the contractor's cost risk, and whether the development cost was recovered directly or indirectly from Government sources should be weighed.

(2) *Unusual pricing agreements.* Occasionally, unusual contract pricing arrangements are made with the contractor wherein it agrees to cost ceilings, e.g., a ceiling on overhead rates for conditions other than those discussed at FAR 42.707. In such circumstances, the contractor should receive favorable consideration in developing the profit objective.

(3) *Negative factors.* Special situations need not be limited to those which only increase profit levels. A negative consideration may be appropriate when the contractor is expected to obtain spin-off benefits as a direct result of the contract (e.g., products or services with commercial application).

[49 FR 13979, Apr. 9, 1984, as amended at 53 FR 15563, May 2, 1988]

### **315.905-74 Facilities capital cost of money.**

When facilities capital cost of money (cost of capital committed to facilities) is included as an item of cost in the contractor's proposal, a reduction in the profit objective shall be made in an amount equal to the amount of facilities capital cost of money allowed in accordance with the Facilities Capital Cost-of-Money Cost Principal. If the contractor does not propose this cost, a provision must be inserted in the contract that facilities capital cost of money is not an allowable cost.

[49 FR 13979, Apr. 9, 1984, as amended at 53 FR 15563, May 2, 1988]

## **Subpart 315.10—Preaward, Award, and Postaward Notifications, Protests, and Mistakes**

### **315.1000 General.**

Once a contract action has progressed through the evaluation process, and even after the selection of a contractor, all queries as to the relative merits of the submitted proposals shall be courteously but firmly directed to the contracting officer. All other personnel will avoid any exchange of comments with offerors.

[49 FR 13979, Apr. 9, 1984. Redesignated and amended at 50 FR 23132, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

### **315.1003 Debriefing of unsuccessful offerors.**

(a) Any HHS employee who receives either a written or oral request for a debriefing from an unsuccessful offeror shall immediately, without any discussion regarding the merits or deficiencies of the unsuccessful offeror's proposal, refer the request to the contracting officer. If the request is made orally, the contracting officer shall require that the request be made in writing. The contracting officer or his/her designee shall be present at all debriefings and shall review written debriefings prior to release.

(b) A debriefing is intended to: (1) Tell an unsuccessful offeror which areas of its proposal were judged to be weak and deficient and whether the weaknesses or deficiencies were factors in its not having been selected; and

(2) Identify the factors which were the basis for selection of the successful contractor. If the quality of the successful offeror's proposal to satisfy the mission requirement was the basis, the unsuccessful offeror should be so informed, and given a general comparison of significant areas, but not a point-by-point comparison of all the elements considered in the evaluation criteria. If the successful offeror was selected on the basis of cost, the unsuccessful offeror should be told that was the case. If selection was based on other factors, they should be specified.

(d) If an unsuccessful offeror feels that its failure to obtain the award was not justified, it will rely, at least in part, on the information given in the debriefing to determine whether it should seek recourse. Accordingly, it is essential that a debriefing be conducted in a scrupulously fair, objective, and impartial manner, and that the information given the unsuccessful offeror be absolutely factual and consistent with the findings of the contracting officer and the basis on which the award was made.

(e) In some cases, it may be necessary to arrange informal debriefings for an unsuccessful offeror's personnel by departmental technical evaluators. This determination will be made by, and meeting arrangements will be the responsibility of, the contracting officer.

(f) It is very important that all departmental personnel engaged in the evaluation and selection processes be aware of the policies and procedures in FAR Subpart 15.10 and this Subpart 315.10. Detailed and complete records of the acquisition will be maintained by key technical and contracting personnel in a manner which will facilitate either a written or an oral debriefing of any unsuccessful offeror.

[49 FR 13979, Apr. 9, 1984. Redesignated and amended at 50 FR 23132, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

#### **315.1004 Protests against award.**

See Subpart 333.1.

[49 FR 13979, Apr. 9, 1984. Redesignated and amended at 50 FR 23132, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

#### **315.1005 Discovery of mistakes.**

See 314.406 and 315.607.

[49 FR 13979, Apr. 9, 1984. Redesignated at 50 FR 23132, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

### **Subpart 315.70—Requests for Contract**

#### **315.7000 Scope of subpart.**

This subpart prescribes the format and contents of the request for contract and provides procedures for the preparation and submission of the request for contract document.

#### **315.7001 General.**

The program office's preparation of the request for contract (RFC) and submission to the contracting activity finalizes the presolicitation phase of the acquisition planning process and commences the solicitation phase. The RFC is the formal document which initiates the preparation of the request for proposals by the contracting activity and sets the acquisition process in motion. It represents the results of planning by the project officer and contract negotiator and contains much of the pertinent information necessary for the development of a sound, comprehensive RFP.

#### **315.7002 Procedures.**

(a) Requests for contract are required to be prepared by the program office for all proposed negotiated acquisitions estimated to exceed the small purchase limitation.

(b) The program office should submit the RFC as early as possible to the contracting activity. The proposed period of time between the date of submission of the RFC and the date of contract award (or date of delivery of the product, service, study, etc.) should be determined by the project officer, contract negotiator, and, if necessary, the contracting officer. The amount of leadtime should be determined on a case-by-case basis and should reflect the characteristics and complexities of the individual acquisition. When lengthy and/or involved clearances or special approval are required, for example, they must be taken into account when the leadtime is determined. If a formal acquisition planning document is used, (see Subpart 307.1), the RFC should be submitted in accordance with the timetable set forth in that document. OPDIV, agency, and regional office contracting activities may prescribe specific leadtimes for submission of RFC's in their implementation of this subpart.

[49 FR 13979, Apr. 9, 1984, as amended at 53 FR 15563, May 2, 1988; 56 FR 47003, Sept. 17, 1991]

#### **315.7003 Responsibilities.**

It is the responsibility of the project officer to prepare the RFC so that it

complies with the requirements of this subpart and any OPDIV, agency, or regional office guidance issued in accordance with this subpart. Prior to the submission of the RFC to the contracting activity, the head of the program office sponsoring the project shall review the RFC to ensure that all required information is provided in the prescribed format and a technical review of the statement of work has been made. The level and extent of the technical review is to be commensurate with the estimated cost, importance, and complexity of the proposed acquisition, and must be thorough enough to ensure that vague and ambiguous language is eliminated, the statement of work is structured by phases or tasks, if appropriate, and methods are available for assessing the contractor's technical, cost, and delivery performances.

#### **315.7004 Transmittal.**

The RFC will be conveyed to the contracting activity by use of a covering memorandum or other form of transmittal. The transmittal document must be signed by the head of the sponsoring program office and include both a statement attesting to the conclusiveness of the review discussed in the preceding section and a list identifying all attachments to the RFC. A standard format for the transmittal document may be prescribed by the OPDIV, agency, or regional office contracting activity.

#### **315.7005 Format and content.**

The Department does not prescribe a standard format for the RFC document, but recommends the use of a format similar to what is provided in this section. The subject areas addressed in paragraphs (a) and (b) must be included in every RFC document, whereas the areas addressed in paragraph (c) need only be included if applicable. An OPDIV, agency, or regional office contracting activity may prescribe a standard format for the RFC document and may include additional subject areas that are pertinent to that activity's needs. Some of the information to be furnished in the RFC document may be repetitive of that found in the acquisition planning document. If this infor-

mation has not changed since the development of the acquisition planning document, the RFC document may either restate the information as it appears in the acquisition planning document or cross reference the applicable portion where the information appears.

(a) The RFC document must contain the following:

(1) *Purpose of contract.* A brief, general description of requirements, including the citation of the legislation which authorizes the program or project, is to be provided, along with a statement as to the intended purpose/use of the proposed contract.

(2) *Background and need.* The background history and necessity for the proposed contract are to be described. This section is to include prior, present, and planned efforts by the program office in the same or related areas, and a description of efforts by other departmental activities and Federal agencies in the same or related program areas, if known. In addition, specific project information such as the relevance or contribution to overall program objectives, reasons for the need, priority, and project overlap are to be provided.

(3) *Period of performance.* The number of months (or other time period) required for total performance, and, if applicable, for each phase of work indicated in the statement of work, is to be specified. The program office must indicate the proposed starting date and the required date of delivery for each deliverable.

(4) *Estimated cost and fund citation.* The project officer's estimate of the total cost of the proposed contract, and, if applicable, the estimate for each phase indicated in the statement of work, is to be provided. The project officer must provide a cost breakdown of all contributing cost factors, to include an estimate of the technical staff hours, direct materials, subcontracting, travel, etc. The project officer may consult with contracting and cost advisory personnel in developing this information. This section must include the certification of funds availability for the particular proposed acquisition, along with the appropriation and accounting information citations. When funds are not currently available but

are anticipated, a statement indicating that the financial plan includes provision for the funds for the proposed acquisition but the funds are not yet available for obligation shall be included in lieu of the certification of funds availability. (Contracts cannot be awarded unless funds are available, but see FAR 32.703-2.)

(5) *Reference material.* A list, by title and description, of study reports, plans, drawings, and other data to be made available to prospective offerors for use in preparation of proposals and/or the contractor for use in performance of the contract is to be provided. The project officer must indicate whether this material is currently available or when it will be available.

(6) *Technical evaluation criteria and instructions.* The project officer is to include the technical evaluation criteria, which have been developed based on the requirements of the specific project, and any instructions and information which will assist in the preparation of prospective offerors' technical proposals. For example, critical areas discussed in the statement of work and the relative order of importance and weights assigned to each of these areas for technical evaluation purposes must be identified. These areas may include understanding of the problem, technical approach, experience, personnel, facilities, etc.

(7) *Sources for solicitation.* The project officer is to develop and include a list of known potential sources by name and mailing address. The project officer is encouraged to use trade and professional journals and publications to identify new prospective sources to supplement the list of known sources. Efforts to identify set-aside possibilities, i.e., small, disadvantaged, and labor surplus areas, and women-owned businesses, must be explained.

(8) *Special approvals, clearances, and requirements.* All special approvals, clearances, and requirements pertinent to the proposed acquisition are to be listed in this section. Copies of the actual documents are to be attached to the RFC. If the approval, clearance, or requirement has been requested and is being processed, a footnote to this effect, including all pertinent details, must be included in this section. A list

of Government-wide and Department imposed approvals, clearances, and requirements is set forth in 307.105-2. Comprehensive checklists of these and any OPDIV, agency, regional office, etc. special approvals, clearances, and requirements shall be provided for reference purposes to program offices by the servicing contracting activity.

(9) *Identification and disposition of data.* The project officer must identify the data expected to be generated by the acquisition and specify the data to be delivered to the Department (see 315.7005(b)(2)) and that to be retained by the contractor. The project officer must also include information relative to the use, maintenance, disclosure, and disposition of data. The project officer must include a statement as to whether or not another acquisition, based upon the data generated by the proposed acquisition, is anticipated. The project officer must also include a statement indicating whether the proposed acquisition is or is not subject to the Privacy Act (see FAR Subpart 24.1 and Subpart 324.1).

(10) *Project officer and alternate.* The project officer's name, title, organization, mailing address, and telephone number are to be provided in this section, along with the same data for the project officer's alternate. In addition, a statement that the project officer has completed the Department's project officer training course is to be provided (see 307.170).

(b) The following must be submitted with every RFC but are to be prepared as separate attachments so they may be readily adopted into the request for proposal format:

(1) *Statement of work or specification.* The statement of work describes the requirements to be performed and may describe the methods to be used (see 307.105-3 and FAR 35.005 for a detailed explanation). A specification is used in lieu of a statement of work when a clear and accurate description of the technical requirements for a product, material, or service can be provided along with the procedure to determine that the requirements have been met. It is essential that a complete and comprehensive statement of work or specification be provided by the project officer.

(2) *Schedule of deliverables or reporting requirements.* The project officer must specifically describe what is to be delivered and when it is to be delivered to ensure proper contract monitoring. Usually, technical and financial progress reports and the final report are prescribed in this section. These reports should be tailored to the instant acquisition and should avoid unnecessary and burdensome reporting requirements.

(c) The following may not be applicable to all RFC's but must be included as attachments whenever any do apply:

(1) *Government property.* The project officer must identify, as referenced in the statement of work, the types, individual items, and quantities of Government property to be furnished to or allowed to be acquired by, the resultant contractor, if known. The project officer must specify when the Government property is to be made available to the resultant contractor.

(2) *Special terms and conditions.* The project officer may suggest inclusion of any special terms and conditions applicable to the proposed acquisition not already covered in the statement of work or the applicable contract general provisions.

(3) *Justification for other than full and open competition.* If the proposed acquisition is to be awarded using other than full and open competition, a justification, prepared in accordance with FAR Subpart 6.3 and Subpart 306.3, must be submitted as an attachment to the RFC.

(4) *Privacy Act "system notice."* When the project officer has determined that the requirements of the Privacy Act are applicable to the proposed acquisition, a copy of the "system notice" must be attached to the RFC (see 324.103(d)).

[49 FR 13979, Apr. 9, 1984, as amended at 50 FR 23132, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

### 315.7006 Review.

Upon receipt of the RFC, the contracting activity shall review the contents to ensure that all pertinent information has been provided by the program office. If pertinent information is missing or if there are discrepancies in previously agreed upon information,

such as significant alterations in the statement of work, the contracting activity shall obtain or clarify the information so that the acquisition schedule is met. If the program office delays furnishing the information or clarification, the acquisition schedule may have to be changed. When this circumstance arises, the contracting activity should notify the head of the sponsoring program office of the problem, in writing, of the possible slippage in the acquisition schedule, and the need for an expeditious remedy. If the head of the sponsoring program office is not responsive to the request for expediency, the matter should be referred to higher management authorities for resolution.

[49 FR 13979, Apr. 9, 1984, as amended at 49 FR 36110, Sept. 14, 1984]

## PART 316—TYPES OF CONTRACTS

### Subpart 316.3—Cost-Reimbursement Contracts

Sec.

316.301 General.

316.301-3 Limitations.

316.303 Cost-sharing contracts.

316.306 Cost-plus-fixed-fee contracts.

316.307 Contract clauses.

### Subpart 316.4—Incentive Contracts

316.403 Fixed-price incentive contracts.

### Subpart 316.6—Time-and-Materials, Labor-Hour, and Letter Contracts

316.601 Time-and-materials contracts.

316.603 Letter contracts.

316.603-2 Application.

316.603-3 Limitations.

316.603-70 Information to be furnished when requesting authority to issue a letter contract.

316.603-71 Approval for modifications to letter contracts.

### Subpart 316.7—Agreements

316.702 Basic agreements.

316.770 Unauthorized types of agreements.

316.770-1 Letters of intent.

316.770-2 Memorandums of understanding.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 14004, Apr. 9, 1984, unless otherwise noted.

### Subpart 316.3—Cost-Reimbursement Contracts

#### 316.301 General.

##### 316.301-3 Limitations.

(c) The following format shall be used and executed by the contracting officer as the determination and findings authorizing the use of a cost-reimbursement contract and establishing the fee:

DEPARTMENT OF HEALTH AND HUMAN  
SERVICES—DETERMINATION AND FINDINGS

#### *Authority to Use Cost-Reimbursement Contract*

I hereby find that:

(1) The (agency title) proposes to contract with (name of proposed contractor) for (describe work, service, or product) (identify program or project). The estimated cost is (\$——) (if contract is CPFF type, insert, “plus a fixed fee of (\$——) which is — percent of the estimated cost exclusive of fee”).

(2) (Set forth facts and circumstances that show why it is impracticable to secure property or services of the kind or quantity required without the use of the proposed type of contract or why the proposed method of contracting is likely to be less costly than other methods.) I hereby determine that:

On the basis of the above findings, and in accordance with FAR 16.301-3, it is impracticable to secure the property or services of the kind or quality required without the use of a (cost, cost-sharing, or cost-plus-a-fixed fee\*) type of contract, *or* the (cost, cost-sharing, or cost-plus-a-fixed fee\*) method of contracting is likely to be less costly than other methods.

Date \_\_\_\_\_  
Signature \_\_\_\_\_

[49 FR 14004, Apr. 9, 1984, as amended at 50 FR 23132, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 51 FR 44294, Dec. 9, 1986]

#### 316.303 Cost-sharing contracts.

For detailed information concerning the use of cost-sharing contracts, see 335.070.

#### 316.306 Cost-plus-fixed-fee contracts.

(c)(2) The determination and findings (D&F) required by FAR 16.306(c)(2) has been combined with the D&F required by FAR 16.301-3(c) authorizing the use of cost-reimbursement contract, and is shown in 316.301-3(c). The contracting officer is responsible for executing the

\*Use applicable word, words, or statement.

D&F and is authorized to make both determinations required by the FAR.

[51 FR 44294, Dec. 9, 1986]

#### 316.307 Contract clauses.

(a) If the contract is with a hospital (profit or nonprofit), modify the “Allowable Cost and Payment” clause at FAR 52.216-7 by deleting from paragraph (a) the words “subpart 31.2 of the Federal Acquisition Regulation (FAR)” and substituting “45 CFR part 74 appendix E.”

(j) The contracting officer shall insert the clause at 352.216-72, Additional Cost Principles, in solicitations and resultant cost-reimbursement contracts with nonprofit organizations, as identified in OMB Circular A-122.

[55 FR 42197, Oct. 18, 1990]

### Subpart 316.4—Incentive Contracts

#### 316.403 Fixed-price incentive contracts.

(c) The determination and findings required by FAR 16.403(c) shall be executed by the chief of the contracting office after it is prepared by the contracting officer.

[51 FR 44294, Dec. 9, 1986]

### Subpart 316.6—Time-and-Materials, Labor-Hour, and Letter Contracts

#### 316.601 Time-and-materials contracts.

(c) *Limitations.* The format prescribed in 316.301-3(c) shall be used and executed by the contracting officer as the determination and findings authorizing the use of either a time-and-materials contract or a labor-hour contract, except that the final paragraph shall be changed to read as follows:

I hereby determine that:

On the basis of the above findings, no other type of contract will suitably serve for the acquisition of the required work or services.

#### 316.603 Letter contracts.

##### 316.603-2 Application.

It is the policy of the Department to refrain from issuing letter contracts.

Exceptions to this policy will be permitted only in those cases where all matters of a substantive nature, such as statements of work, delivery schedules, and general and special clauses have been resolved and agreed upon.

### **316.603-3 Limitations.**

The principal official responsible for acquisition shall be the approving official who executes the prescribed written statement. However, if the principal official responsible for acquisition is to sign the letter contract as the contracting officer, the approving official becomes the head of the contracting activity.

[49 FR 14004, Apr. 9, 1984, as amended at 51 FR 44294, Dec. 9, 1986]

### **316.603-70 Information to be furnished when requesting authority to issue a letter contract.**

The following information should be included by the contracting officer in any memorandum requesting approval to issue a letter contract:

- (a) Name and address of proposed contractor.
- (b) Location where contract is to be performed.
- (c) Contract number, including modification number, if possible.
- (d) Brief description of work and services to be performed.
- (e) Performance or delivery schedule.
- (f) Amount of letter contract.
- (g) Estimated total amount of definitized contract.
- (h) Type of definitive contract to be executed (fixed price, cost-reimbursement, etc.).
- (i) Statement of the necessity and advantage to the Government of the use of the proposed letter contract.
- (j) Statement of percentage of the estimated cost that the obligation of funds represents. In rare instances where the obligation represents 50 percent or more of the proposed estimated cost of the acquisition, a justification for that obligation must be included which would indicate the basis and necessity for the obligation (e.g., the contractor requires a large initial outlay of funds for major subcontract awards or an extensive purchase of materials to meet an urgent delivery requirement). In every case, documentation

must assure that the amount to be obligated is not in excess of an amount reasonably required to perform the work.

(k) Period of effectiveness of the proposed letter contract. If more than 180 days, complete justification must be given.

(l) Statement of any substantive matters that need to be resolved.

### **316.603-71 Approval for modifications to letter contracts.**

All letter contract modifications (amendments) must be approved by the principal official responsible for acquisition. Requests for authority to issue letter contract modifications shall be processed in the same manner as requests for authority to issue letter contracts and shall include the following:

- (a) Name and address of the contractor.
- (b) Description of work and services.
- (c) Date original request was approved and indicate approving official.
- (d) Letter contract number and date issued.
- (e) Complete justification as to why the letter contract cannot be definitized at this time.
- (f) Complete justification as to why the level of funding must be increased.
- (g) Complete justification as to why the period of effectiveness is increased beyond 180 days, if applicable.
- (h) If the funding of the letter contract is to be increased to more than 50 percent of the estimated cost of the acquisition, the information required by 316.603-70(j) must be included.

## **Subpart 316.7—Agreements**

### **316.702 Basic agreements.**

- (b) *Application.*
  - (2) Basic agreements shall continue in effect until termination, supersession, or expiration of the term.
  - (d) *Contracts incorporating basic agreements.*
    - (2) Any provision of a contract which conflicts with the terms of a basic agreement must be approved by the Director, Division of Acquisition Policy, OAGM.

(4) Basic agreements may include negotiated overhead rates for cost-reimbursement type contracts. Where negotiated overhead rates are included, the bases to which the rates apply and the period of applicability must also be stated. All pertinent provisions such as final rates for past periods, provisional rates for current or future periods, ceilings, and any specific items to be treated as indirect costs shall also be included as appropriate.

(e) *Content and format.* A basic agreement shall consist of an execution page(s), contents page, special provisions, and general provisions. The following is illustrative of an execution page:

Basic Agreement      Page 1 of—  
Number                      pages

Basic Agreement

Between the United States of America, as represented by the Department of Health and Human Services, and (Name of Contractor), this agreement, effective (Insert Date) by and between the United States of America, hereinafter called the "Government," as represented by the Department of Health and Human Services, and (Name of Contractor), a corporation organized and existing under the laws of the (State/Commonwealth) of \_\_\_\_\_ with its principal office in (City, State), hereinafter called the "Contractor".

WITNESSETH THAT

Whereas, the Government and the Contractor desire to enter into a single basic agreement for use only in connection with negotiated (insert type of contract and categories of effort that the basic agreement will cover) entered into on or after the effective date of this Agreement, and prior to its termination; and

Whereas, the parties understand that this Agreement shall not in any manner provide for or imply any agreement on the part of the Government to place future orders or contracts with the Contractor.

Now therefore, the Government and the Contractor agree that the provisions and clauses of the Special Provisions, as set forth herein, and the General Provisions, as set forth and modified herein, shall be incorporated in and constitute the terms and conditions applicable to all negotiated (insert type of contract and categories of effort that the basic agreement will cover) entered into on or after the effective date of this Agreement, and prior to its termination.

In witness whereof, the parties hereto have executed this Agreement as of the day and year first above written.

United States of America

Name of Contractor \_\_\_\_\_  
\_\_\_\_\_  
Signature of Contracting Officer  
By \_\_\_\_\_  
Signature of Authorized Official  
Typed name \_\_\_\_\_  
Typed name \_\_\_\_\_  
Date \_\_\_\_\_

(f) *Procedures.* (1) Negotiation of basic agreements may be undertaken by OPDIV contracting activities on behalf of the Department. When an OPDIV contracting activity decides to negotiate a basic agreement with an organization, prior authorization must be requested, in writing, from the Director, Division of Acquisition Policy (DAP). When the Director, DAP, gives written authorization to the OPDIV contracting activity designated to conduct negotiations on behalf of the Department, all other OPDIVs will be notified of this designation. If another OPDIV elects, it may attend the negotiation or furnish special terms and conditions or provisions for inclusion in the proposed basic agreement by advising the designated negotiating activity in writing within ten (10) days from the date of the authorization. After review and resolution of all requests for inclusion of special terms and conditions or provisions, the designated negotiating activity will invite those OPDIVs which expressed an interest in attending the negotiations and make the necessary arrangements for the negotiation of the basic agreement.

(2) Prior to the conclusion of negotiations, the designated negotiating activity shall furnish the OPDIVs a draft copy of the proposed basic agreement together with:

(i) A resume of all salient features of the basic agreement which will facilitate review;

(ii) Any of the negotiating OPDIV's guides or procedures which are being considered for incorporation into the basic agreement by reference;

(iii) A listing of nonstandard clauses used, the genesis of such clauses, and the reasons for such clauses in the basic agreement; and

(iv) The contractor's comments, including the basis for requesting any deviation from the HHSAR and the designated negotiating activity's position with respect thereto.

(3) The OPDIVs shall have fifteen (15) days from the date of the memorandum transmitting the information to submit comments on the draft copy of the basic agreement. After receipt, analysis, and resolution of the comments of the OPDIVs, the designated negotiating activity will proceed to conclude the negotiation of the basic agreement.

(4) After conclusion of the negotiation, but prior to execution of the basic agreement, a copy of the basic agreement, together with the information specified in paragraph (f)(2) above, the comments of the OPDIVs, the designated negotiating activity's analysis of the OPDIV comments, and the basis for the action taken will be furnished to the Director, DAP for review by DPP and the Office of General Counsel. Approval by the Director, DAP must be given prior to the execution of the basic agreement. After approval and execution of the basic agreement, the designated negotiating activity will distribute the executed document to the OPDIVs, Office of General Counsel, and the Director, DAP. The basic agreement is mandatory for use by all activities of the Department for all acquisitions falling within the scope of the basic agreement.

[49 FR 14004, Apr. 9, 1984, as amended at 50 FR 23126, 23133, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 54 FR 24343 June 7, 1989; 54 FR 24343, June 7, 1989]

### **316.770 Unauthorized types of agreements.**

#### **316.770-1 Letters of intent.**

A letter of intent is an informal unauthorized agreement between the Government and a prospective contractor which indicates that products or services will be produced after completion of funding and/or other contractual formalities. Letters of intent are often solicited by prospective contractors or may be originated by Government personnel. Letters of intent are not authorized by the FAR and are prohibited for use by Department personnel.

#### **316.770-2 Memorandums of understanding.**

A "memorandum of understanding" is an unauthorized agreement, usually

drafted during the course of negotiations, to modify mandatory FAR and HHSAR provisions in such a manner as to make them more acceptable to a prospective contractor. It may be used to bind the contracting officer in attempting to exercise rights given the Government under the contract, or may contain other matters directly contrary to the language of the solicitation or prospective contractual document. Use of such memorandums of understanding is not authorized. Any change in a solicitation or contract shall be made by amendment or modification to that document. When a change to a prescribed contract clause is considered necessary, a deviation shall be requested.

## **PART 317—SPECIAL CONTRACTING METHODS**

### **Subpart 317.2—Options**

Sec.

317.201 Definition.

317.202 Use of options.

317.203 Solicitations.

317.206 Evaluation.

### **Subpart 317.70—Consolidated Acquisitions**

317.7001 General.

317.7002 Policy.

### **Subpart 317.71—Supply and Service Acquisitions Under the Government Employees Training Act**

317.7100 Scope of subpart.

317.7101 Applicable regulations.

317.7102 Acquisition of training.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 14006, Apr. 9, 1984, unless otherwise noted.

### **Subpart 317.2—Options**

#### **317.201 Definition.**

(a) An option must:

(1) Identify the supplies or services as a discrete option quantity in addition to the basic quantity of supplies or services to be delivered under the initial contract award;

(2) Establish a price or specify a method of calculation which will make the price certain;

(3) Be agreed to and included in the initial contract award; and

(4) Permit the Government the right to exercise the option unilaterally.

(b) Contract provisions which provide the Government the right to buy additional requirements, subject to the written agreement of the contractor, do not meet the requirements of paragraph (a)(4) of this section and are not authorized. Further, any contract provision which merely extends the initial contract period without requiring delivery of additional supplies or services is not an option.

**317.202 Use of options.**

(c)(6) The primary purpose for inclusion would be the achievement of administrative convenience.

**317.203 Solicitations.**

(g)(2) When unusual circumstances exist, the principal official responsible for acquisition (not delegable) may approve a greater percentage (but see FAR 17.205).

**317.206 Evaluation.**

The determination referenced in FAR 17.206(b) shall be made by the chief of the contracting office.

[49 FR 14006, Apr. 9, 1984, as amended at 53 FR 43208, Oct. 26, 1988]

**Subpart 317.70—Consolidated Acquisitions**

**317.7001 General.**

Studies have indicated that substantial savings can be realized through centralized and consolidated acquisitions of common use supplies, services, and equipment. The Department has identified common use items and has applied the principle of consolidated acquisition to these items.

**317.7002 Policy.**

(a) The following supplies, services, and equipment have been identified as common use items and are to be acquired by the centralized contracting activity identified in paragraph (b):

(1) Administrative supplies, equipment, and services (i.e., general use office items or related services), as distinguished from functional or program requirements.

(2) Automated data processing services (but see ADP Systems Manual, Chapter 4).

(3) Stenographic reporting services.

(4) Visual arts, graphics, and supplementing services.

(5) Press clipping services.

(b) Activities within the metropolitan Washington, DC area are required to submit purchase requests for the above items to the applicable centralized contracting activity as follows:

(1) Activities located in the Southwest Washington complex; Procurement Branch, Division of Contract Operations, Office of Acquisition and Grants Management, Office of the Secretary.

(2) Parklawn Complex, Rockville, Maryland (Montgomery and Prince Georges Counties area); Division of Acquisition Management, Administrative Services Center, Office of Management, Public Health Service.

(3) National Institutes of Health; Division of Procurement, National Institutes of Health.

(c) Activities outside the metropolitan Washington, DC area are encouraged to establish centralized points to conduct acquisitions for common use items.

[49 FR 14006, Apr. 9, 1984, as amended at 54 FR 24343, June 7, 1989; 55 FR 13536, Apr. 11, 1990]

**Subpart 317.71—Supply and Service Acquisitions Under the Government Employees Training Act**

SOURCE: 53 FR 43208, Oct. 26, 1988, unless otherwise noted.

**317.7100 Scope of subpart.**

This subpart provides alternate methods for obtaining training in non-Government facilities under the Government Employees Training Act, 5 U.S.C. chapter 41.

**317.7101 Applicable regulations.**

Basic policy, standards, and delegations of authority to approve training are contained in HHS Personnel Manual Instruction 410-1.

317.7102

48 CFR Ch. 3 (10-1-97 Edition)

**317.7102 Acquisition of training.**

(a) The acquisition of interagency training courses and non-governmental off-the-shelf training courses, whether for individual employees or for groups of employees, is the responsibility of

the Assistant Secretary for Personnel Administration.

(b) Non-governmental training must be acquired through the contracting office if there are costs for training course development or for modification of off-the-shelf training courses.

## SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

### PART 319—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

#### Subpart 319.2—Policies

Sec.

319.201 General policy.

319.201-70 Small and disadvantaged business utilization specialist.

319.270 Federal acquisition conferences.

#### Subpart 319.5—Set-Asides for Small Business

319.501 General.

319.503 Setting aside a class of acquisitions.

319.503-70 Small business class set-aside for construction, repair, and alteration work.

319.505 Rejecting set-aside recommendations.

319.506 Withdrawing or modifying set-asides.

319.570 Contract payments.

#### Subpart 319.7—Subcontracting With Small Business and Small Disadvantaged Business Concerns

319.705 Responsibilities of the contracting officer under the subcontracting assistance program.

319.705-2 Determining the need for a subcontracting plan.

319.705-3 Preparing the solicitation.

319.705-4 Reviewing the subcontracting plan.

319.705-5 Awards involving subcontracting plans.

319.705-6 Postaward responsibilities of the contracting officer.

319.706 Responsibilities of the cognizant administrative contracting officer.

#### Subpart 319.8—Contracting with the Small Business Administration (the 8(a) Program)

319.800 General.

319.803 Selecting acquisitions for the 8(a) Program.

319.812 Contract administration.

319.870 Liaison with the Small Business Administration.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 14007, Apr. 9, 1984, unless otherwise noted.

#### Subpart 319.2—Policies

##### 319.201 General policy.

(c) The functional management responsibilities for the Department's small business, disadvantaged business, and labor surplus area programs are delegated to the Director of the Office of Small and Disadvantaged Business Utilization (OSDBU).

(1) The Director, OSDBU is responsible for:

(i) Recommending to the Under Secretary overall Department-wide operating concepts and policies relating to the Department's small business, disadvantaged business, and labor surplus area programs;

(ii) Implementing policy decisions through the issuance of operating procedures (Operating Divisions (OPDIVs) may develop alternative procedures for achieving departmental policy goals, and objectives. However, any change in procedures must be approved by the Under Secretary);

(iii) Reviewing and evaluating the Department's policies, practices, and procedures pertaining to the disadvantaged business, small business, and labor surplus area programs, as well as recommending changes or corrective actions to the OPDIV heads or to the Under Secretary, as appropriate;

(iv) Providing the Under Secretary with regular appraisals of performance and quality of effort, including timely notification of significant problems, events, and accomplishments, and the need for changes in Department-wide objectives and policies; and

(v) Providing technical assistance and support to the small and disadvantaged business utilization specialists.

(2) The Director, OSDBU is authorized to:

(i) Establish standards, procedures and operating guidelines controlling the manner in which the small business, disadvantaged business, and labor surplus area programs are conducted throughout the Department;

(ii) Provide advice on proposed allocations of personnel, funds, and other resources in light of the total needs of the Department;

(iii) Prescribe, after coordination with appropriate concerned personnel, reporting requirements necessary to preserve openness in reporting, identifying emerging problems, monitor Department-wide activity, and provide a basis for appraisal and evaluation of performance. To the maximum extent, these reporting requirements will be satisfied through existing Department-wide reporting systems or by making modifications to them;

(iv) Conduct surveys and review of operating practices in the OPDIVs and regional offices; and

(v) Communicate directly with the small and disadvantaged business utilization specialists to assist them in carrying out their individual and collective responsibilities.

**319.201-70 Small and disadvantaged business utilization specialist.**

(a) The Head of each OPDIV shall appoint a qualified full time small and disadvantaged business utilization specialist (SADBUS) in the following activities: Office of Human Development Services (OHDS), Health Care Financing Administration (HCFA), Social Security Administration (SSA), Public Health Service (PHS), to include the Food and Drug Administration (FDA), Health Resources and Services Administration (HRSA) (and each regional Office of Engineering Services), Indian Health Service (IHS), National Institutes of Health (NIH), Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA), Centers for Disease Control (CDC), and Administrative Services Center (ASC). A SADBUS shall also be appointed for the Office of the Secretary (OS) and for each Regional Office. As deemed necessary, additional small and disadvantaged business utilization specialists may be appointed in larger contracting activities.

(b) When the volume of contracting does not warrant assignment of a full-time SADBUS, an individual shall be appointed as the specialist on a part-time basis. The responsibilities of this assignment shall take precedence over other responsibilities. The specialist shall be responsible directly to the appointing authority and shall be at an organizational level outside the direct

acquisition chain of command, i.e., should report directly to the principal official responsible for acquisition, where appropriate.

(c) The Director, OSDDBU will exercise functional management authority over small and disadvantaged business utilization specialist regarding small business, disadvantaged business, and labor surplus area matters. Appointments of SADBUS's shall only be made after consultation with the Director, OSDDBU. A copy of each appointment and termination of appointment of specialists shall be forwarded to the Director, OSDDBU.

(d) The SADBUS shall perform the following duties, as determined to be appropriate to the activity by the appointing official or by the Director, OSDDBU. The SADBUS shall:

(1) Maintain a program designed to locate capable small business, disadvantaged business, women-owned business and labor surplus area business sources for current and future acquisitions, through SBA or by using other methods, establish appropriate source lists for each category, and work closely with contracting and small purchasing offices to ensure offers are solicited from firms on the source lists;

(2) Coordinate inquiries and requests for advice from small business, disadvantaged business, women-owned business, and labor surplus area business concerns on acquisition matters, and counsel them with respect to business opportunities to enhance their potential participation in the Department's acquisition program;

(3) Prior to the issuance of solicitations (or contract modifications for additional supplies or services) in excess of the small purchase limitation, which have not been reviewed, reserved, or set-aside by the contracting officer, review the contracting officer's justification for such action;

(4) Assure that small business, disadvantaged business, women-owned business, and labor surplus area concerns are provided adequate specifications or drawings by initiating actions, in writing, with appropriate technical and contracting personnel to ensure that all necessary specifications or

drawings for current and future acquisitions, as appropriate, are available;

(5) Review proposed requirements for possible breakout of items suitable for acquisitions from small business, disadvantaged business, women-owned business, and labor surplus area concerns;

(6) Assure that financial assistance, available under existing regulations, is offered, and that requests by small business concerns for proper assistance are not treated as a handicap in the award of contracts;

(7) Participate in determinations concerning responsibility of prospective contractors whenever small business concerns are involved;

(8) Participate in the evaluation of a prime contractor's small business, labor surplus area, and disadvantaged business subcontracting plans;

(9) Advise and assist contracting officers in discharging their responsibilities by:

(i) Monitoring and reviewing contractor performance to determine compliance with small and small disadvantaged business subcontracting plans, and

(ii) Developing and maintaining records and reports that reflect such compliance or noncompliance;

(10) Review and make appropriate recommendations to the contracting officer on proposals to furnish Government-owned facilities to contractors if this action may enhance the small business program;

(11) Assure that the participation of small businesses, disadvantaged businesses, women-owned business, and labor surplus area concerns is accurately reported;

(12) Make available to SBA copies of solicitations when so requested;

(13) When a bid or offer from a small business, disadvantaged business, women-owned business, or labor surplus area concern has been rejected for nonresponsiveness or nonresponsibility, upon request, aid, counsel and assist that firm in understanding requirements for responsiveness and responsibility so that the firm may be able to qualify for future awards;

(14) Participate in government-industry conferences to assist small business, disadvantaged business, women-

owned business, and labor surplus area concerns, including Business Opportunity/ Federal Acquisition Conferences, Minority Business Enterprises Acquisition Seminars, and Business Opportunity Committee meetings;

(15) Advise potential sources how they can obtain information about sealed bid and negotiated acquisitions;

(16) Brief the head of the contracting activity at least once quarterly concerning the status of the activity's small business, disadvantaged business, women-owned business, and labor surplus area programs in relation to goals and objectives established;

(17) Participate in the development, implementation, and review of automated source systems to assure that the interests of small business, disadvantaged business, women-owned business, and labor surplus area concerns are fully considered;

(18) Assure that the organization maintains a list of products and services which are categorized as repetitive small business set-aside;

(19) Provide small business, disadvantaged business, women-owned business, and labor surplus area concerns information regarding assistance available from Federal agencies such as the Small Business Administration, Minority Business Development Agency, Bureau of Indian Affairs, Economic Development Administration, National Science Foundation, Department of Labor, and others, including State agencies and trade associations;

(20) Be responsible for establishing an education and training program for personnel whose duties and functions affect the activity's small business, disadvantaged business, women-owned business, and labor surplus areas programs; and

(21) Participate in interagency programs relating to small business, disadvantaged business, women-owned business, and labor surplus area matters as authorized by the Director, OSD/BU.

[49 FR 14007, Apr. 9, 1984, as amended at 50 FR 23126, 23133, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 54 FR 24343, June 7, 1989; 57 FR 11690, Apr. 7, 1992]

**319.270 Federal acquisition conference.**

The Department of Commerce is responsible for coordinating the participation of Federal civilian agencies in a continuing series of conferences which are sponsored by members of Congress. The objectives of these conferences are:

- (a) Location of additional acquisition sources to broaden the acquisition base of Federal agencies;
- (b) Stimulation of local, regional, and national economic growth, national security, and cost reduction;
- (c) Location of underutilized production capacity;
- (d) Prevention or elimination of pockets of underemployment; and
- (e) Assistance of small and small disadvantaged business concerns.

As notified by the OSDDBU, contracting activities shall provide appropriate SADBUS or acquisition personnel to participate in person-to-person counseling at these conferences. Ordinarily, participation by contracting activities will be restricted to conferences held within the geographical areas adjacent to their offices. The brochure, "How To Do Business With DHHS" should be of great assistance in this counseling as it has been specifically prepared to assist individuals, firms, and institutions who may wish to do business with this Department. It contains a brief description of the mission and programs of HHS and its Operating Divisions and provides a listing of contracting offices and the types of services and commodities acquired by each.

### Subpart 319.5—Set-Asides for Small Business

**319.501 General.**

(c) Prior to the contracting officer's review, the SADBUS shall review each proposed acquisition to determine the feasibility of recommending award to the Small Business Administration (SBA) pursuant to section 8(a) of the Small Business Act. When it cannot be awarded to SBA pursuant to section 8(a), the SADBUS shall review the proposed acquisition to determine if it can be recommended as a set-aside under one of the set-aside priorities stated in FAR 19.504. The SADBUS's rec-

ommendation shall be entered on Form HHS-653, Small Business-Labor Surplus Set-Aside Review Form, with the reasons for the type of set-aside recommended, or the reasons for not recommending a set-aside, and provided to the contracting officer. Upon receipt of the Form HHS-653, the contracting officer shall promptly concur or nonconcur with the SADBUS's recommendation. The contracting officer will make the final determination as to whether the proposed acquisition will be set-aside or not. If the contracting officer approves the SADBUS's set-aside recommendation, the proposed acquisition will be set-aside as specified. However, if the contracting officer disapproves the SADBUS's set-aside recommendation, the reasons must be documented on the Form HHS-653, and the form signed. (See 319.505 for options available to the SADBUS regarding the contracting officer's disapproval of a set-aside recommendation.) In all cases, the completed Form HHS-653 is to be retained by the contracting officer and placed in the contract file.

[57 FR 11690, Apr. 7, 1992]

**319.503 Setting aside a class of acquisitions.****319.503-70 Small business class set-aside for construction, repair, and alteration work.**

A small business class set-aside is considered to have been made for each proposed acquisition for construction, repair, and alteration work in an estimated amount ranging from \$2,500 to \$2 million. Accordingly, the contracting officer shall set aside for small business each proposed acquisition. If, in his/her judgment, the particular acquisition falling within the dollar limits specified above is unsuitable for a set-aside for exclusive small business participation, the procedure set forth in FAR 19.506 shall apply. Proposed acquisitions for construction, repair, and alteration work in an estimated amount of more than \$2 million shall be processed on a case by case basis.

**319.505 Rejecting set-aside recommendations.**

(a) If the contracting officer rejects the SADBUS's recommendation for a

set-aside and an SBA procurement center representative (PCR) is not assigned or available, the SADBUS may appeal, in writing, to the head of the contracting activity (HCA) or his/her designee. The SADBUS shall provide the HCA or designee all the pertinent information concerning the set-aside disagreement, and the HCA shall respond in writing within seven business days. The HCA's decision is final and not appealable. The decision by the HCA shall be attached to the Form HHS-653 and placed in the contract file. After receipt of a final decision by the HCA, and if the decision approves the action of the contracting officer, the SADBUS shall forward, for information and management purposes, complete documentation of the case to the OSDBU Director. Documentation transmitted shall include, as a minimum, a copy of the appeal memorandum submitted to the HCA, a copy of the IFB or RFP, a list of proposed sources, a copy of the Form HHS-653 and attachments completed by the SADBUS and the contracting officer, a copy of the HCA's decision, and all other written material considered by the HCA in arriving at the decision. The SADBUS' transmittal memorandum shall contain an affirmative statement that the attachments constitute the complete file reviewed and considered by the HCA in making the final decision.

If an SBA PCR is assigned or available and the SADBUS refers the case to that person, the SBA PCR may either concur with the decision of the contracting officer not to set-aside the proposed acquisition or recommend to the contracting officer that it be set-aside. For the SBA PCR to make a comprehensive review, at least the following should be provided as attachments to the Form HHS-653: the statement of work, evaluation criteria, Government cost estimate, source list including size of firms, and a copy of any justification for other than small business considerations that may be applicable. Once the case has been referred to the SBA PCR, no further appeal action shall be taken by the SADBUS. (Refer to FAR 19.505 for the procedures available to the SBA PCR if the con-

tracting officer rejects the set-aside recommendation.)

[49 FR 14007, Apr. 9, 1984, as amended at 57 FR 11690, Apr. 7, 1992]

#### **319.506 Withdrawing or modifying set-asides.**

(b) If an SBA PCR is not assigned, the disagreement between the contracting officer and the SADBUS shall be referred to the HCA for resolution.

(d) Immediately upon notice from the contracting officer, the SADBUS shall provide telephone notification regarding all set-aside withdrawals to the OSDBU Director.

#### **319.570 Contract payments.**

Contract payments to small business concerns must be made on a timely basis. Payment of an invoice or voucher must be made within 30 days after receipt of the invoice or voucher or from acceptance of the goods or services. Each invoice or voucher from a small business concern not sent directly to the servicing finance office, but received by the contracting activity, shall be stamped or otherwise identified for expedited payment before it is forwarded to the servicing finance office.

### **Subpart 319.7—Subcontracting With Small Business and Small Disadvantaged Business Concerns**

#### **319.705 Responsibilities of the contracting officer under the subcontracting assistance program.**

##### **319.705-2 Determining the need for a subcontracting plan.**

The dollar value of all proposed incremental funding actions shall be included in determining whether the acquisition meets the dollar threshold requiring a subcontracting plan. The subcontracting plan shall be based on the total value of the acquisition which will include the value of all option quantities or funding actions.

##### **319.705-3 Preparing the solicitation.**

The SBA PCR should be allowed a period of one to five business days for the review of the solicitation, depending

upon the circumstances and complexity of the individual acquisition.

[49 FR 14007, Apr. 9, 1984, as amended at 57 FR 11690, Apr. 7, 1992]

**319.705-4 Reviewing the subcontracting plan.**

The offeror's/bidder's subcontracting plan for small business concerns shall be judged independently of the subcontracting plan for small disadvantaged business concerns. If a subcontracting plan is not obtained, the contracting officer must document the contract file to substantiate the reasons why the plan was not obtained. The contracting officer must obtain a satisfactory subcontracting plan prior to awarding the contract.

(d) If the contracting officer determines that the subcontracting plan submitted reflects the best effort by the offeror/bidder to award subcontracts to small and small disadvantaged business concerns, but the SADBUS disagrees with the contracting officer's determination, a final determination shall be made by the principal official responsible for acquisition. The SADBUS shall submit this final determination to the Director, OSDBU with the appropriate supporting documentation.

(1) The contracting officer may accept the terms of an overall or "master" company subcontracting plan if it is incorporated by reference into a specific subcontracting plan submitted by the apparent successful offeror/bidder for a specific contract, if:

(i) The master plan contains all the elements required by the statute;

(ii) Subcontracting goals for small and small disadvantaged business concerns are specifically set forth in each contract or modification over the statutory thresholds;

(iii) Any changes to the plan deemed necessary and required by the contracting officer in areas other than goals are specifically set forth in the contract or modification;

(iv) The contracting officer has copies of the entire plan; and

(v) The SBA PCR has had an opportunity to comment on the master plan.

(2) If the prime contract is for a commercial product, the required subcontracting plan may relate to the

company's production of the item generally (both for the Government contract and for regular commercial sale) rather than solely to the item being acquired under the Government contract. In such cases, the contractor shall be required to submit one company-wide, annual plan to be reviewed for approval by the first agency with which it enters into a prime contract (which requires a subcontracting plan) during the fiscal year. The approved plan will remain in effect for the entire fiscal year and is applicable to all deliveries made under contracts entered into during the contractor's fiscal year, even though these deliveries are made in a succeeding fiscal year. The contractor shall submit a new plan to the first agency with which it enters into a contract (over the statutory threshold) during a succeeding fiscal year. The new plan shall apply to all deliveries made under contracts entered into during the succeeding fiscal year, no matter when the deliveries are made.

[49 FR 14007, Apr. 9, 1984, as amended at 57 FR 11690, Apr. 7, 1992]

**319.705-5 Awards involving subcontracting plans.**

(a)(3) The SBA PCR shall be allowed a period of one to five business days to review the contract award package, depending upon the circumstances and complexity of the individual acquisition.

**319.705-6 Postaward responsibilities of the contracting officer.**

The SADBUS shall perform the distribution requirements stated in paragraphs (a) through (c) of FAR 19.705-6. A copy of any company-wide plans and associated approvals shall also be sent to the Director, OSDBU by the SADBUS. In addition, the SADBUS is responsible for summarizing and reporting to the Director, OSDBU, on a quarterly basis, all prime contracts \$500,000 and over (\$1 million for construction) using the following reporting format:

(a) Name of the OPDIV and program office;

(b) Number and dollar amount of contracts requiring subcontracting plans;

(c) Number of contracts with subcontracting plans;

(d) Number of contracts without subcontracting plans;

(e) Small and small disadvantaged business subcontracting goals; and

(f) Statements citing reasons why small and small disadvantaged business subcontracting plans were not included in the contracts.

**319.706 Responsibilities of the cognizant administrative contracting officer.**

(a) The contracting officer shall comply with the requirements of FAR 19.706(a), and shall use the Standard Form 294, Subcontracting Report for Individual Contracts, to monitor the contractor's progress in achieving both the small business and small disadvantaged business subcontracting goals. The contracting officer shall require the contractor to provide in the Remarks block of each Standard Form 294 submitted a narrative of the progress in fulfilling the small business and small disadvantaged business subcontracting goals. The contracting officer shall require the contractor to report any difficulties in achieving the goals and the actions being taken by the contractor to overcome the difficulties. The contracting officer shall document the contract file whenever the contractor is experiencing difficulties in achieving the planned subcontracting goals, and shall indicate the actions taken by the contractor to resolve the difficulties and the actions taken by the contracting officer to remedy the situation. A copy of this documentation shall be provided to the SADBUS.

(b) At the time of physical completion of the contract, the contracting officer shall prepare a memorandum for record for inclusion in the contract file indicating whether or not the contractor complied with the subcontracting plan and subcontracting provisions of the contract.

(1) If the contractor achieved its subcontracting dollar goals for both small business and small disadvantaged business, the memorandum shall state that the contractor complied with the subcontracting plan and provisions of the contract. No other documentation is needed.

(2) If the contractor failed to achieve its subcontracting dollar goals for either small business or small disadvantaged business, or both, the contracting officer shall indicate this failure in the memorandum and determine whether the contractor did or did not exercise its best efforts in attempting to achieve the goals.

(i) If determined that the contractor exercised its best efforts, the contractor shall be found to have complied with the subcontracting plan and provisions of the contract. The rationale for this determination shall be documented in the memorandum.

(ii) If determined that the contractor did not exercise its best efforts, the contractor shall be found to have not complied with the subcontracting plan and provisions of the contract. The reasons for this determination shall be documented in the memorandum, along with a description of specific actions taken by the contracting officer during the performance of the contracting to attempt to remedy the failure.

(c) A copy of the memorandum pertaining to either situation described in paragraph (b)(2) (i) or (ii) of this section shall be sent to the Director, Office of Small and Disadvantaged Business Utilization.

[50 FR 46299, Nov. 7, 1985]

**Subpart 319.8—Contracting with the Small Business Administration (the 8(a) Program)**

SOURCE: 55 FR 13536, Apr. 11, 1990, unless otherwise noted.

**319.800 General.**

(c) The signing of the contract document may be accepted as the Small Business Administration's (SBA) certification that SBA is competent to perform a specific HHS requirement.

**319.803 Selecting acquisitions for the 8(a) Program.**

(c) Brochures of 8(a) concerns which have been interviewed by the Office of Small and Disadvantaged Business Utilization (OSDBU) are forwarded to each

small and disadvantaged business utilization specialist (SADBUS). These brochures are to be reviewed by the SADBUS to match HHS requirements with the capabilities of these concerns. The SADBUS will make the capabilities of these concerns known to program personnel and will obtain information, as needed, by contacting OSDBU or SBA.

**319.812 Contract administration.**

(b) The responsibility for subcontract administration and field inspection will, in most cases, be delegated by SBA to the contracting activity. The contracting activity may develop a tripartite agreement for execution by SBA, the 8(a) subcontractor, and the contracting activity instead of developing separate modifications for the SBA contract and the 8(a) subcontract.

(c) Some 8(a) concerns may need additional management expertise for optimal performance and completion of a particular contract. Therefore, when subcontract administration is delegated to HHS by SBA, the contracting activity shall promptly apprise the SBA, the SADBUS, and OSDBU whenever the contractor is experiencing problems. SBA should provide necessary technical assistance so the contractor can successfully complete the contract.

(d) The OSDBU, SADBUS, and SBA are to be notified prior to initiating final action to terminate an 8(a) contract.

**319.870 Liaison with the Small Business Administration.**

(a) Contracting activities will maintain a continuous liaison with the SBA to ensure that the overall goals of each activity are achieved. In the event there is a dispute between the contracting activity and a SBA representative regarding any aspect of 8(a) contracting, the contracting activity must promptly notify OSDBU.

(b) The business development responsibility of SBA requires them to assist in and monitor the growth and development of all 8(a) concerns. Therefore, it is incumbent upon HHS to assist SBA in this effort by utilizing the source selection process in a manner that would

make use of the largest possible number of 8(a) concerns.

**PART 320—LABOR SURPLUS AREA CONCERNS**

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

**Subpart 320.1—General**

**320.102 General policy.**

Contracting activities should obtain appropriate publications and other information identifying labor surplus areas from:

U.S. Department of Labor, Employment and Training Administration, Office of Policy Evaluation and Research, Division of Labor Market Information, Washington, D.C. 20530.

Contracting officers shall use the "Directory of Labor Surplus Area Contractors," provided by the Office of Small and Disadvantaged Business Utilization, as a source to identify labor surplus area concerns and to augment other labor surplus area source lists. Contracting officers should also seek to identify concerns from labor surplus areas by placing sources sought synopses in the Commerce Business Daily. Small and disadvantaged business utilization specialists shall assist contracting officers in developing and maintaining source lists of small business and other concerns in labor surplus areas. Department of Commerce and SBA regional and field offices should be contacted for assistance in identifying labor surplus area concerns.

[49 FR 14012, Apr. 9, 1984]

**PART 322—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS**

**Subpart 322.6—Walsh-Healey Public Contracts Act**

Sec.

322.604 Exemptions.

322.604-2 Regulatory exemptions.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

## Subpart 322.6—Walsh-Healey Public Contracts Act

### 322.604 Exemptions.

#### 322.604-2 Regulatory exemptions.

(c)(1) The actions required by FAR 22.604-2(c)(1) shall be exercised by the Director, Office of Acquisition and Grants Management (DOAGM). Contracting offices requiring exemptions shall forward requests through normal acquisition channels to the DOAGM.

[51 FR 44294, Dec. 9, 1986; 51 FR 47353, Dec. 31, 1986, as amended at 54 FR 24343, June 7, 1989]

## PART 324—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

### Subpart 324.1—Protection of Individual Privacy

Sec.

324.100 Scope of subpart.

324.102 General.

324.103 Procedures.

### Subpart 324.2—Freedom of Information Act

324.202 Policy.

#### Subpart 324.70—Confidentiality of Information

324.7001 General.

324.7002 Policy.

324.7003 Applicability.

324.7004 Required clause.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 14013, Apr. 9, 1984, unless otherwise noted.

### Subpart 324.1—Protection of Individual Privacy

#### 324.100 Scope of subpart.

This subpart implements 45 CFR part 5b, Privacy Act Regulations, and FAR subpart 24.1, Protection of Individual Privacy, which implement the Privacy Act of 1974 (Pub. L. 93-579, December 31, 1974; 5 U.S.C. 552a) and OMB Circular No. A-108, July 9, 1975.

#### 324.102 General.

(a) It is the Department's policy to protect the privacy of individuals to the maximum possible extent while permitting the exchange of records re-

quired to fulfill the Department's administrative and program responsibilities and its responsibilities for disclosing records to which the general public is entitled under the Freedom of Information Act (5 U.S.C. 552). The Privacy Act of 1974 and the Department's implementation under 45 CFR part 5b apply "when an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish any agency function . . ." The key factor is whether a departmental function is involved. Therefore, the Privacy Act requirements apply to a departmental contract when, under the contract, the contractor must maintain or operate a system of records to accomplish a departmental function.

(e) The program official, and, as necessary, the official designated as the activity's Privacy Act Coordinator and the Office of General Counsel, shall determine the applicability of the Act to each proposed acquisition. The program official is required to include a statement in the request for contract indicating whether the Privacy Act is or is not applicable to the proposed acquisition.

(f) Whenever the contracting officer is informed that the Privacy Act is not applicable, but the resultant contract will involve the collection of individually identifiable personal data by the contractor, the contracting officer shall include provisions to protect the confidentiality of the records and the privacy of individuals identified in the records (see subpart 324.70).

#### 324.103 Procedures.

(a) All requests for contract shall be reviewed by the contracting officer to determine whether the Privacy Act requirements are applicable. If applicable, the contracting officer shall include the solicitation notification and contract clause required by FAR 24.104 in the solicitation, and the contract clause in the resultant contract. In addition, the contracting officer shall ensure that the solicitation notification, contract clause, and other pertinent information specified in this subpart are included in any contract modification

which results in the Privacy Act requirements becoming applicable to a contract.

(b)(1) The contracting officer shall identify the system(s) of records on individuals in solicitations, contracts, and contract modifications to which the Privacy Act and the implementing regulations are applicable.

(2) The contracting officer shall include a statement in the contract notifying the contractor that the contractor and its employees are subject to criminal penalties for violations of the Act (5 U.S.C. 552a(i)) to the same extent as employees of the Department. The statement shall require that the contractor assure that each contractor employee knows the prescribed rules of conduct, and each contractor employee is aware that he/she can be subjected to criminal penalties for violations of the Act. The contracting officer shall provide the contractor with a copy of the rules of conduct and other requirements set forth in 45 CFR 5b.

(c) The contracting officer shall include in the contract the disposition to be made of the system(s) of records on individuals upon completion of performance of the contract. For example, the contract may require the contractor to completely destroy the records, to remove personal identifiers, to turn the records over to the Department, or to keep the records but take certain measures to keep the records confidential and protect the individuals' privacy.

(d) Whenever an acquisition is determined to be subject to the Privacy Act requirements, a "system notice," prepared by the program official and describing the Department's intent to establish a new system of records on individuals, to make modifications to an existing system, or to disclose information in regard to an existing system, is required to be published in the FEDERAL REGISTER. A copy of the "system notice" shall be attached to the request for contract or purchase request. If a "system notice" is not attached, the contracting officer shall inquire about its status and shall obtain a copy from the program official for inclusion in the contract file. If a "system notice" has not been published in the FEDERAL REGISTER, the contracting officer

may proceed with the acquisition but shall not award the contract until the "system notice" is published, and publication is verified by the contracting officer.

### Subpart 324.2—Freedom of Information Act

#### 324.202 Policy.

(a) The Department's regulation implementing the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, is set forth in 45 CFR part 5.

(b) The contracting officer, upon receiving a FOIA request, shall follow Department and operating division procedures. As necessary, actions should be coordinated with the cognizant Freedom of Information (FOI) Officer and the Business and Administrative Law Division of the Office of General Counsel. The contracting officer must remember that only the FOI Officer has the authority to release or deny release of records. While the contracting officer should be familiar with the entire FOIA regulation in 45 CFR part 5, particular attention should be focused on sections 5.65 and 5.66; also of interest are sections 5.32, 5.33, and 5.35.

[54 FR 24343, June 7, 1989]

### Subpart 324.70—Confidentiality of Information

#### 324.7001 General.

In the performance of certain HHS contracts, it is necessary for the contractor to generate data, or be furnished data by the Government, which is about individuals, organizations, or Federal programs. This subpart and the accompanying contract clause require contractors to prudently handle disclosure of certain types of information not subject to the Privacy Act or the HHS human subject regulations set forth in 45 CFR Part 46. This subpart and contract clause address the kinds of data to be generated by the contractor and/or data to be furnished by the Government that are considered confidential and how it should be treated.

**324.7002 Policy.**

It is the policy of HHS to protect personal interests of individuals, corporate interests of non-governmental organizations, and the capacity of the Government to provide public services when information from or about individuals, organizations, or Federal agencies is provided to or obtained by contractors in performance of HHS contracts. This protection depends on the contractor's recognition and proper handling of such information. As a result, the "Confidentiality of Information" contract clause was developed.

**324.7003 Applicability.**

(a) The "Confidentiality of Information" clause, set forth in 352.24-70, should be used in solicitations and resultant contracts whenever the need exists to keep information confidential. Examples of situations where the clause may be appropriate include:

(1) Studies performed by the contractor which generate information or involve Government-furnished information that is personally identifiable, such as medical records, vital statistics, surveys, and questionnaires;

(2) Contracts which involve the use of salary structures, wage schedules, proprietary plans or processes, or confidential financial information of organizations other than the contractor's; and

(3) Studies or research which may result in preliminary or unvalidated findings which, upon disclosure to the public, might create erroneous conclusions which, if acted upon, could threaten public health or safety.

(b) With regard to protecting individuals, this subpart and contract clause are not meant to regulate or control the method of selecting subjects and performing studies or experiments involving them. These matters are dealt with in the HHS regulation entitled "Protection of Human Subjects," 45 CFR part 46. If a system of records under contract, or portions thereof, is determined to be subject to the requirements of the Privacy Act, in accordance with FAR 24.1 and 324.1 and Title 45 CFR part 5b, the procedures cited in those references are applicable and the Privacy Act contract clause shall be included in the contract. If the

contract also involves confidential information, as described herein, which is not subject to the Privacy Act, the contract shall include the "Confidentiality of Information" clause in addition to the Privacy Act clause.

**324.7004 Required clause.**

The clause set forth in 352.224-70 shall be included in any RFP and resultant contract(s) where it has been determined that confidentiality of information provisions may apply. Any REP announcing the intent to include this clause in any resultant contract(s) shall indicate, as specifically as possible, the types of data which would be covered and requirements for handling such data.

**PART 325—FOREIGN ACQUISITION****Subpart 325.1—Buy American Act—Supplies**

Sec.

325.102 Policy.

325.108 Excepted articles, materials, and supplies.

325.108-70 Formats for nonavailability determinations.

**Subpart 325.3—Balance of Payments Program**

325.302 Policy.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 14015, Apr. 9, 1984, unless otherwise noted.

**Subpart 325.1—Buy American Act—Supplies****325.102 Policy.**

(b) The head of the contracting activity shall make the determinations required by FAR 25.102(a) (1) through (5) and FAR 25.102(b).

[51 FR 44294, Dec. 9, 1986; 51 FR 47353, Dec. 31, 1986]

**325.108 Excepted articles, material, and supplies.**

(b) Articles, materials, and supplies not listed in FAR 25.108(d) may be excepted only after a written determination has been made by the head of the contracting activity. These determinations are required only in instances

where it has been determined that only suppliers of foreign source end items shall be solicited. However, approvals and determinations covering individual acquisitions in the following categories may be made by the contracting officer:

(1) Acquisition of spare and replacement parts for foreign manufactured items, if the acquisition must be restricted to the original manufacturer or its supplier; and

(2) Acquisition of foreign drugs when it has been determined, in writing, by the responsible program official, that only the requested foreign drug will fulfill the requirement.

Formats for the above referenced written determinations are shown in 325.108-70.

#### **325.108-70 Formats for nonavailability determinations.**

(a) The following is the format for a nonavailability determination made by a contracting officer:

##### **DETERMINATION OF NONAVAILABILITY**

Pursuant to the authority contained in section 2, Title III, of the Act of March 3, 1933, popularly called the Buy American Act (41 U.S.C. 10(a-d)), and authority delegated to me by 325.108(b), I hereby find that:

(a) (Insert a description of the item or items to be acquired, including unit, quantity, and estimated cost inclusive of duty and transportation costs to destination.)

(b) (Enter the name and address of the proposed contractor or supplier, and country of origin of the item or items.)

(c) (Include a statement of the necessity for the acquisition.)

(d) (Include a statement of facts establishing the nonavailability of a similar item or items of domestic origin. If there is no known domestic item or items which can be used as a reasonable substitute, a statement to this effect will be made.)

Based upon these findings, it is determined that the above-described item(s) is (are) not mined, produced, or manufactured, or the articles, materials, or supplies from which it (they) is (are) manufactured, are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

Accordingly, the requirement of the Buy American Act that acquisition be made from domestic sources and that it be of domestic origin is not applicable to this acquisition, since the referenced acquisition is within the nonavailability exception stated in the Buy

American Act. Authority is granted to acquire the above-described item(s) of foreign origin (country of origin) at an estimated total cost of \$——, including duty and transportation cost to destination.

(Date) \_\_\_\_\_

(Contracting Officer)

(b) The following is the format for a non-availability determination made by the head of the contracting activity. Part 1 of the determination shall be signed by the preparing authority (contracting officer of official with contracting authority), and Part 2 shall be signed by the approving authority.

##### **DETERMINATION OF NONAVAILABILITY**

###### **Part 1**

Date \_\_\_\_\_

Pursuant to the authority contained in Section 2, Title III, of the Act of March 3, 1933, popularly called the Buy American Act (41 U.S.C. 10(a-d)), I hereby find:

(a) (Insert a description of the item or items to be acquired, including unit, quantity, and estimated cost inclusive of duty and transportation costs to destination.)

(b) (Insert a brief statement of the necessity for the acquisition.)

(c) (Include a statement of facts establishing the nonavailability of a similar item or items of domestic origin.)

Based upon the above showing of fact, it is determined that the above described item(s) is (are) not mined, produced, or manufactured, or the articles, materials, or supplies from which it (they) is (are) manufactured, are not mined, produced or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(Signature) \_\_\_\_\_

###### **Part 2**

The requirement of the Buy American Act that acquisition be made from domestic sources and that it be of domestic origin is not applicable to the above described acquisition, since the referenced acquisition is within the nonavailability exception stated in the Act. The feasibility of foregoing the requirement or providing a United States substitute has been considered. Authority is granted to acquire the above described item(s) of foreign origin (country of origin) at an estimated total cost of \$——, including duty and transportation costs to destination.

(Signature) \_\_\_\_\_

Department of Health and Human Services

325.302

**Subpart 325.3—Balance of  
Payments Program**

official responsible for acquisition (not  
delegable).

**325.302 Policy.**

All determinations addressed in FAR  
25.302 shall be made by the principal of-

## SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

### PART 328—BONDS AND INSURANCE

#### Subpart 328.3—Insurance

Sec.

328.301 Policy.

328.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

328.311-2 Contract clause.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 56 FR 58316, Nov. 19, 1991, unless otherwise noted.

#### Subpart 328.3—Insurance

##### **328.301 Policy.**

(a) It is the policy of this Department to limit the Government's reimbursement of its contractors' liability to third persons for claims not covered by insurance in cost-reimbursement contracts to the Limitation of Funds or Limitation of Cost clause of the contract.

(b) In addition to the limitations in paragraph (a) of this section, the amount of the Government's reimbursement will be limited to final judgments or settlements approved in writing by the Government.

##### **328.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.**

##### **328.311-2 Contract clause.**

(a) The contracting officer shall insert the clause at 352.228-7, Insurance—Liability to Third Persons, in all solicitations and resulting cost-reimbursement contracts, in lieu of the clause at FAR 52.228-7.

### PART 330—COST ACCOUNTING STANDARDS

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

### Subpart 330.2—CAS Program Requirements

#### **330.201-5 Waiver.**

(c) The requirements of FAR 30.201-5 shall be exercised by the Director, Office of Acquisition and Grants Management (DOAGM). Requests for waivers shall be forwarded through normal acquisition channels to the DOAGM.

[54 FR 24344, June 7, 1989]

### PART 332—CONTRACT FINANCING

#### Subpart 332.4—Advance Payments

Sec.

332.402 General.

332.403 Applicability.

332.406 Letters of credit.

332.407 Interest.

332.409 Contracting officer action.

332.409-1 Recommendation for approval.

#### **Subpart 332.5—Progress Payments Based on Costs**

332.501 General.

332.501-2 Unusual progress payments.

#### **Subpart 332.7—Contract Funding**

332.702 Policy.

332.703 Contract funding requirements.

332.703-1 General.

332.704 Limitation of cost or funds.

332.705 Contract clauses.

332.705-2 Clauses for limitation of costs or funds.

#### **Subpart 332.9—Prompt Payment**

Sec.

332.902 Definitions.

332.905 Invoice payments.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 14018, Apr. 9, 1984, unless otherwise noted.

#### **Subpart 332.4—Advance Payments**

##### **332.402 General.**

(e) The determination that the making of an advance payment is in the public interest (See FAR 32.402(c)(1)(iii)(A)) shall be made by the

respective principal official responsible for acquisition (PORA).

[52 FR 27560, July 22, 1987, as amended at 55 FR 42197, Oct. 18, 1990]

### **332.403 Applicability.**

All contracts for research work with educational institutions located in the United States shall provide for financing by use of advance payments, in reasonable amounts, unless otherwise prohibited by law.

### **332.406 Letters of credit.**

(c)(1) A blanket determination and findings authorizing interest free advance payments under a single letter of credit has been executed and remains in effect for each of the nonprofit organizations listed in Attachment I "Single Letter of Credit Recipients and Central Point Addressees." These determinations and findings are applicable to all existing and future contracts entered into by the Department, its operating divisions, OS staff offices, and regional offices. All contracts with the listed organizations which require advance payments (whether under section 305 of the Federal Property and Administrative Services Act of 1949, as amended, or other statutory authority) shall provide for payment to be made under the appropriate letter of credit. The clause set forth in 352.232-73 shall be included in all such contracts and the cognizant fiscal office shall be apprised of its inclusion.

(2) In those instances where it is practical and feasible to finance an advance payment under a letter of credit other than one which is incorporated under a single letter of credit described in paragraph (c)(1) above, a determination and findings shall be executed by the PORA if the cited authority is to be section 305 of the Federal Property and Administrative Services Act. In cases where an authority other than section 305 is to be used, a determination and findings shall be submitted to the appropriate official authorized by the cited statute to approve the advance payment.

(3) The Treasury Department's letter of credit method of financing advance payments shall be employed, whenever feasible. Department-wide blanket letters of credit, which apply to the fi-

ancing of research contracts and grants between the institution and all activities of the Department, shall be utilized to the maximum extent practicable. Where a particular educational institution is supported by research contracts and grants with only one operating division of the Department, a single letter of credit, applicable to all research contracts and grants between the institution and that operating division may be employed.

[49 FR 14018, Apr. 9, 1984, as amended at 50 FR 23133, May 31, 1985; 50 FR 38004, Sept. 19, 1985; 51 FR 44294, Dec. 9, 1986; 55 FR 42197, Oct. 18, 1990]

### **332.407 Interest.**

(d) The PORA is authorized to make the determinations in FAR 32.407(d) and as follows. In addition to the interest-free advance payments for the types of contracts listed in FAR 32.407(d), advance payments without interest may be approved for nonprofit contracts which are without fee with educational institutions and other nonprofit organizations, whether public or private, which are for the performance of work involving health services, educational programs, or social service programs, including, but not limited to, programs such as:

(1) Community health representative services for an Indian Tribe or Band;

(2) Narcotic addict rehabilitative services;

(3) Comprehensive health care service program for Model Neighborhood programs;

(4) Planning and development of health maintenance organizations;

(5) Dissemination of information derived from educational research;

(6) Surveys or demonstrations in the field of education;

(7) Producing or distributing educational media for handicapped persons including captioned films for the deaf;

(8) Operation of language or area centers;

(9) Conduct of biomedical research and support services;

(10) Research surveys or demonstrations involving the training and placement of health manpower and health professionals, and dissemination of related information; and

(11) Surveys or demonstrations in the field of social service.

[49 FR 14018, Apr. 9, 1984, as amended at 51 FR 44294, Dec. 9, 1986; 52 FR 27560, July 22, 1987; 55 FR 42197, Oct. 18, 1990]

### **332.409 Contracting officer action.**

#### **332.409–1 Recommendation for approval.**

The information in FAR 32.409–1 (or FAR 32.409–2) shall be transmitted to the PORA in the form of a briefing memorandum.

[49 FR 14018, Apr. 9, 1984, as amended at 51 FR 44294, Dec. 9, 1986; 52 FR 27560, July 22, 1987; 55 FR 42197, Oct. 18, 1990]

## **Subpart 332.5—Progress Payments Based on Costs**

### **332.501 General.**

[51 FR 44294, Dec. 9, 1986]

#### **332.501–2 Unusual progress payments.**

(a)(3) The approval of an unusual progress payment shall be made by the appropriate principal official responsible for acquisition (PORA).

[51 FR 44294, Dec. 9, 1986, as amended at 52 FR 27560, July 22, 1987; 55 FR 42197, Oct. 18, 1990]

## **Subpart 332.7—Contract Funding**

### **332.702 Policy.**

An incrementally funded contract is a contract in which the total work effort is to be performed over multiple time periods and funds are allotted to cover discernible phases or increments of performance.

(a) Incremental funding may be applied to cost-reimbursement type contracts for the acquisition of research and development and other types of nonpersonal, nonseverable services. It shall not be applied to contracts for construction services, architect-engineer services, or severable services. Incremental funding allows nonseverable cost-reimbursement contracts, awarded for more than one year, to be funded from succeeding fiscal years.

(b) It is departmental policy that contracts for projects of multiple year duration be fully funded, whenever pos-

sible, to cover the entire project. However, incrementally funded contracts may be used when:

(1) A project, which is part of an approved program, is anticipated to be of multiple year duration, but funds are not currently available to cover the entire project;

(2) The project represents a valid need of the fiscal year in which the contract is awarded and of the succeeding fiscal years of the project's duration, during which additional funds may be obligated by increasing the allotment to the contract;

(3) The project is so significant to the approved program that there is reasonable assurance that it will command a high priority for proposed appropriations to cover the entire multiple year duration; and

(4) The statement of work is specific and is defined by separate phases or increments so that, at the completion of each, progress can be effectively measured.

[49 FR 14018, Apr. 9, 1984, as amended at 57 FR 35473, Aug. 10, 1992]

### **332.703 Contract funding requirements.**

#### **332.703–1 General.**

(b) The following general guidelines are applicable to incrementally funded contracts:

(1) The estimated total cost of the project (all planned phases or increments) is to be taken into consideration when determining the requirements which must be met before entering into the contract; i.e., justification for noncompetitive acquisition, approval of award, etc.

(2) The RFP and resultant contract are to include a statement of work which describes the total project covering the proposed multiple year period of performance and indicating time-tables consistent with planned phases or increments and corresponding allotments of funds.

(3) Offerors will be expected to respond to RFPs with technical and cost proposals for the entire project indicating distinct break-outs of the planned phases or increments.

(4) Negotiations will be conducted based upon the total project, including

all planned phases or increments, and the multiple year period of performance.

(5) Sufficient funds must be obligated under the basic contract to cover no less than the first year of performance, unless the contracting officer determines it is advantageous to the Government to fund the contract for a lesser period. In that event, the contracting officer shall ensure that the obligated funds are sufficient to cover a complete phase or increment of performance representing a material and measurable part of the total project, and the contract period shall be reduced accordingly.

(6) Because of the magnitude of the scope of work and multiple year period of performance under an incrementally funded contract, there is a critical need for careful program planning. Program planning must provide for appropriate surveillance of the contractor's performance and adequate controls to ensure that projected funding will not impinge on the program office's ability to support, within anticipated appropriations, other equally important contract or grant programs.

(7) An incrementally funded contract must contain precise requirements for progress reports to enable the project officer to effectively monitor the contract. The project officer should be required to prepare periodic performance evaluation reports to facilitate the program office's ultimate decision to allot additional funds under the contract.

#### **332.704 Limitation of cost or funds.**

For detailed instruction regarding administrative actions in connection with anticipated cost overruns, see subpart 342.71.

#### **332.705 Contract clauses.**

##### **332.705-2 Clauses for limitation of costs or funds.**

(c) (1) When using the Limitation of Funds clause (FAR 52.232-22) in the solicitation and resultant incrementally funded contract, the contracting officer shall insert the following legend between the clause title and the clause text:

(This clause supersedes the Limitation of Cost clause found in the General Provisions of this contract.)

(2) The contracting officer shall also include a clause reading substantially as that shown in 352.232-74 in the Special Provisions of the resultant incrementally funded contract.

(3) The request for proposals must inform prospective offerors of the Department's intention to enter into an incrementally funded contract. Therefore, the contracting officer shall include the provision at 352.232-75 in the request for proposals whenever the use of incremental funding is contemplated.

### **Subpart 332.9—Prompt Payment**

#### **332.902 Definitions.**

*Fiscal office* means the office responsible for: (a) Determining whether interest penalties are due a contractor and, if so, the amount, (b) determining whether an invoice offers a financially advantageous discount, (c) maintaining records for and submission of prompt payment reports to the Deputy Assistant Secretary, Finance (DASF), ASMB, OS, and (d) processing payments to the Treasury Department to allow for payment to a contractor when due. The fiscal office shall fulfill the roles of the "designated billing office" and the "designated payment office."

[53 FR 43208, Oct. 26, 1988]

#### **332.905 Invoice payments.**

(a)(1)(ii), (b)(4), (c)(5). In most instances, the contracting officer will use the seven (7) day constructive acceptance period (specified in paragraph (a)(6)(i) of the Prompt Payment clause at FAR 52.232-25, paragraph (a)(5)(i) of the Prompt Payment clause at FAR 52.232-26, and paragraph (a)(4)(i) of the Prompt Payment clause at FAR 52.232-27) for solicitations and resultant contracts as the basis for the fiscal office's computation of interest penalties. However, where the contracting officer extends the constructive acceptance period, under the conditions described in FAR 32.905, the extension shall be coordinated with the fiscal office. A constructive acceptance period of less than seven (7) days is not authorized.

(j) When the contracting officer mistakenly receives an invoice first, or is specified in the contract as the first recipient of the invoice, and the contract requires payment with thirty (30) days from receipt of a “proper invoice” (as defined by FAR 32.902), the contracting officer shall review the invoice to determine whether or not it is proper; and, if so, shall approve the invoice and submit it to the fiscal office within sixteen (16) days from the date of receipt. When the contracting officer is the first recipient of the invoice and the contract establishes a payment due date of more than thirty (30) days after receipt, the contracting officer shall review, approve, and submit the “proper invoice” to the fiscal office at least fourteen (14) days prior to the payment due date (unless the contracting officer and fiscal office agree, prior to contract award, to a longer period).

[54 FR 43966, Oct. 30, 1989]

## PART 333—PROTESTS, DISPUTES, AND APPEALS

### Subpart 333.1—Protests

#### Sec.

- 333.101 Definitions.
- 333.102 General.
- 333.103 Protests to the agency.
- 333.104 Protests to GAO.
- 333.105 Protests to GSBICA.
- 333.106 Solicitation provision and contract clause.

### Subpart 333.2—Disputes and Appeals

- 333.203 Applicability.
- 333.209 Suspected fraudulent claims.
- 333.210 Contracting officer’s authority.
- 333.211 Contracting officer’s decision.
- 333.212 Contracting officer’s duties upon appeal.
- 333.212–70 Formats.
- 333.213 Obligation to continue performance.
- 333.214 Contract clause.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

### Subpart 333.1—Protests

SOURCE: 50 FR 23133, May 31, 1985, unless otherwise noted.

#### 333.101 Definitions.

*Filed*, as used in this subpart, means receipt in the contracting office, the immediate Office of the Secretary, the

General Accounting Office (GAO), or the General Services Board of Contract Appeals (GSBCA), as the case may be.

#### 333.102 General.

(a) Contracting officers shall consider all protests or objections regarding the award of a contract, whether submitted before or after award, provided the protests are filed in a timely manner and are submitted by interested parties. To be considered timely, protests based on alleged improprieties in any type of solicitation which are apparent before bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. In the case of negotiated acquisitions, alleged improprieties which do not exist in initial solicitations, but which are subsequently incorporated by amendment, must be protested not later than the next closing date for receipt of proposals following the incorporation. In other cases, protests shall be filed not later than ten (10) Federal Government working days after the basis for protest is known or should have been known, whichever is earlier. Provided a timely protest has been filed initially with the contracting officer, any subsequent protest to the Secretary or GAO filed within ten (10) Federal Government working days of notification of adverse action will be considered. Written confirmation of all oral protests shall be requested from protestants and must be timely filed.

(d)(1) Office of Acquisition and Grants Management (OAGM) has been designated as the headquarters office to serve as the liaison for protests lodged with GAO. Within OAGM, the Departmental Protest Control Officer (DPCO) has been designated as the individual to be contacted by GAO.

(2) The Office of General Counsel—Business and Administrative Law Division (OGC–BAL) has been designated to serve as the liaison for protests lodged with the GSBCA.

(3) Each contracting activity shall designate a protest control officer to serve as an advisor to the contracting officer and to monitor protests from the time of initial notification until the protest has been resolved. The protest control officer should be a senior

acquisition specialist in the headquarters acquisition staff office. In addition, contracting activities should designate similar officials within their principal components to the extent practicable and feasible. A copy of each appointment and termination of appointment of protest control officers shall be forwarded to the Director, OAGM.

[50 FR 23133, May 31, 1985, as amended at 54 FR 24344, June 7, 1989; 56 FR 47003, Sept. 17, 1991]

### **333.103 Protests to the agency.**

(a)(2) The contracting officer is authorized to make the determination, using the criteria in FAR 33.103(a), to award a contract notwithstanding the protest after obtaining the concurrence of the contracting activity's protest control officer and OGC-BAL. If the protest has been lodged with the Secretary, is addressed to the Secretary, or requests referral to the Secretary, approval shall also be obtained from the Director, OAGM before making the award.

(3) The contracting officer shall require written confirmation of any oral protest. To be considered timely, the written confirmation must be filed in accordance with the applicable provisions in 333.102(a). In the following cases, written protests received by the contracting officer before award shall be forwarded, through acquisition channels, to the DPCO for processing. Files concerning these protests shall be submitted, in duplicate, by the most expeditious means, marked "IMMEDIATE ACTION—PROTEST BEFORE AWARD", and contain the documentation referenced in 333.104(a)(3).

(i) The protestant requests referral to the Secretary of Health and Human Services;

(ii) The protest is known to have been lodged with the Comptroller General or the Secretary, or is addressed to either; or

(iii) The contracting officer entertains some doubt as to the proper action regarding the protest or believes it to be in the best interest of the Government that the protest be considered by the Secretary or the Comptroller General.

Otherwise, submissions of protests to the DPCO may be dispensed with by the contracting officer if he/she is reasonably satisfied that the protest is groundless. In this instance, the contracting officer, with the concurrence of the contracting activity's protest control officer and OGC-BAL, may disallow the protest.

(4) Protests received after award shall be treated as indicated in 333.103(a)(3), above; however, if the files are to be submitted to the DPCO for action, they shall be marked "IMMEDIATE ACTION—PROTEST AFTER AWARD".

[50 FR 23133, May 31, 1985, as amended at 54 FR 24344, June 7, 1989; 56 FR 47003, Sept. 17, 1991; 57 FR 35473, Aug. 10, 1992]

### **333.104 Protests to GAO.**

(a) *General.* (1) A protestor shall be required to furnish a copy of its complete protest to the contracting officer no later than the first working day after the protest is filed with GAO. Immediately upon receiving a copy of the complete protest, the contracting officer shall telephonically notify the contracting activity's protest control officer, who, in turn, shall immediately notify the DPCO. The contracting officer shall provide the name of the protestor, the solicitation number, the date and time the protest was received from the protestor, and any other significant information.

(3) Protests lodged with GAO, whether before or after award, shall be processed by the DPCO. Protest files shall be prepared by the contracting office and distributed as follows: two copies to the DPCO, one copy to the contracting activity's protest control officer, and one copy to OGC-BAL. Files shall include the following documentation:

(i) The contracting officer's statement of facts and circumstances, including a discussion of the merits of the protest, and conclusions and recommendations, including documentary evidence on which they are based.

(ii) A copy of the IFB or RFP.

(iii) A copy of the abstract of bids or proposals.

(iv) A copy of the bid or proposal of the successful offeror to whom award has been made or is proposed to be made.

(v) A copy of the bid or proposal of the protestant, if any.

(vi) The current status of award. When award has been made, this shall include whether performance has commenced, shipment or delivery has been made, or a stop work order has been issued.

(vii) A copy of any mutual agreement to suspend work on a no-cost basis, when appropriate (see FAR 33.104(c)(4)).

(viii) Copies of the notice of protest given offerors and other parties when the notice is appropriate (see FAR 33.104(a)(4)).

(ix) A copy of the technical evaluation report required by 315.608-76, when applicable, and a copy of each evaluator's rating for all proposals.

(x) A copy of the negotiation memorandum, when applicable (see 315.672).

(xi) The name and telephone number of the person in the contracting office who may be contacted for information relevant to the protest, and

(xii) Any document which is referred to in the contracting officer's statement of facts.

The files shall be assembled in an orderly manner and shall include an index of enclosures.

(4) The contracting officer is responsible for making the necessary notifications referenced in FAR 33.104(a)(4). Copies of the views of interested parties submitted in response to the notifications shall be immediately provided to the DPCO upon receipt by the contracting officer.

(5) The contracting officer shall furnish the protest file containing the documentation specified in 333.104(a)(3), except item (i), to the DPCO within twelve (12) work days from receipt of the protest. The contracting officer shall provide the documentation required by item (i) of 333.104(a)(3) to the DPCO within nineteen (19) work days from receipt of the protest. (The contracting activity's protest control officer may provide a written opinion and recommendation on the protest to the DPCO within nineteen (19) work days from receipt of the protest by the contracting officer.) The contracting officer shall clearly identify any documents or portions of documents he or she desires to withhold from the protester, and shall in-

clude justification for the withholding of each document or portion of a document in the contracting officer's statement of facts. Since the statute allows only a short time period in which to respond to protests lodged with GAO, the contracting officer shall handle each protest on a priority basis.

The DPCO shall prepare the report and submit it and the protest file to GAO in accordance with FAR 33.104(a)(5).

(6)(i) The DPCO shall take the necessary actions specified in FAR 33.104(a)(6)(i) after receiving all the documentation required by 333.104(a)(3) from the contracting officer.

(ii) Since the DPCO will furnish the report to GAO, the protestor, and other interested parties, comments on the report from the protester and other interested parties will be requested to be sent to the DPCO.

(7) The Office of Acquisition and Grants Management (OAGM) has been designated as the headquarters office, and the DPCO as the individual, that GAO should contact concerning all protests lodged with GAO.

(b) *Protests before award.* (1) To make an award notwithstanding a protest, the contracting officer shall prepare a finding using the criteria in FAR 33.104(b)(1), have it executed by the principal official responsible for acquisition (PORA), and forward it, along with a written request for approval to make the award, to the Director, OAGM.

(2) If the request to make an award notwithstanding the protest is approved by the Director, OAGM, the DPCO shall notify GAO. Whether the request is approved or not, the DPCO shall telephonically notify the contracting activity's protest control officer of the decision by the Director, OAGM, and the contracting activity's protest control officer shall immediately notify the contracting officer. The DPCO shall confirm the decision by memorandum to the contracting activity's protest control officer.

(4) The contracting office shall prepare the protest file in accordance with 333.104(a)(2), and forward it, in duplicate, to the DPCO (see 333.104(a)(4)). The file shall be marked "IMMEDIATE

## ACTION—PROTEST BEFORE AWARD.”

(c) *Protests after award.* (2) If the contracting officer believes performance should be allowed to continue notwithstanding the protest, a finding shall be prepared by the contracting officer, executed by the PORA, and forwarded, along with a written request for approval, to the Director, OAGM. The same procedures for notification stated in 333.104(b)(2), above shall be followed.

(6) The contracting officer shall prepare the protest file in accordance with 333.104(a)(3), and forward it, in duplicate, to the DPCO (see 333.104(a)(5)). The file shall be marked “IMMEDIATE ACTION—PROTEST AFTER AWARD.”

(d) *Findings and notice.* The contracting officer shall perform the actions required by FAR 33.104(d); however, notification to GAO shall be made by the DPCO.

(g) *Notice to GAO.* The Director, Office of Acquisition and Grants Management shall be the official to comply with the requirements of FAR 33.104(g).

(i) *Express option.* When GAO invokes the express option, the contracting officer shall prepare the complete protest file as described in 333.104(a)(3), to include item (i), and deliver it (hand-carry, if necessary) to the DPCO no later than the close of business on the ninth work day after the express option is invoked. The contracting officer shall involve OGC-BAL as early as possible after receiving notification of the invocation of the express option, and obtain the concurrence of the cognizant OGC-BAL attorney prior to transmitting the protest file to the DPCO. The DPCO shall prepare the report and submit it and the protest file to GAO.

[50 FR 23133, May 31, 1985, as amended at 50 FR 38004, Sept. 19, 1985; 54 FR 24344, June 7, 1989; 55 FR 42197, Oct. 18, 1990; 56 FR 47003, Sept. 17, 1991]

**333.105 Protests to GSBGA.**

(a)(1) The contracting officer shall give telephone notification to the DPCO, OGC-BAL, and the contracting activity's protest control officer immediately upon notification of the protest.

(2)(i) The contracting officer is responsible for complying with the requirement in FAR 33.105(a)(2)(i).

(ii) The cognizant OGC-BAL attorney is responsible for complying with the requirement stated in FAR 33.105(a)(2)(ii).

(b) As soon as possible but no later than six (6) work days after the filing of the protest, a copy of the protest file containing *all* documents (see FAR 33.105(b), especially (b)(7)), and labeled on the cover “FOR USE BY DPCO ONLY”, shall be in the hands of the DPCO for review. Simultaneously, two copies of the same protest file provided to the DPCO shall be provided to the cognizant OGC-BAL attorney. These two copies shall be labeled on the cover “FOR USE BY OGC-BAL.” After consultation with the cognizant OGC-BAL attorney, the DPCO shall transmit the protest file to the GSBGA.

(1) Rather than furnishing a decision, the contracting officer shall include a statement of facts and circumstances and a discussion of the merits of the protest, as well as conclusions and recommendations and documentary evidence on which they are based. These statements shall be reviewed by the cognizant OGC-BAL attorney before being finalized.

(7) The DPCO shall provide all parties with a list of documents furnished to the GSBGA for *in camera* review.

(10) The copies of the protest files to be provided to the DPCO and OGC-BAL shall also contain the documents or information specified in 333.104(a)(3)(vii) through (xii). The file shall be assembled in an orderly manner and include an index of enclosures.

(c) The cognizant OGC-BAL attorney is responsible for complying with the requirement stated in FAR 33.105(c).

(d)(1) If the protest requests a suspension of acquisition authority, the contracting officer must make this known to the DPCO, OGC-BAL, and the contracting activity's protest control officer at the time of the initial telephone notification of the filing of the protest to afford an opportunity for the DPCO, OGC-BAL, principal official responsible for acquisition (PORA), and contracting officer to take appropriate action.

(2) If it can be established that the conditions stated in FAR 33.105(d)(1)(i) and (ii) are present, the contracting officer shall prepare a D&F setting forth the circumstances. The D&F shall be concurred in by the cognizant OGC-BAL attorney before being executed by the PORA (not delegable).

(g) If an appeal is to be made by the Department regarding a final decision issued by the GSBGA, it shall be made by OGC-BAL.

[50 FR 23133, May 31, 1985, as amended at 50 FR 38004, Sept. 19, 1985; 56 FR 47003, Sept. 17, 1991]

### **333.106 Solicitation provision and contract clause.**

(a) The provision at FAR 52.233-2, Service of Protest, shall be completed by entering the name and complete mailing address of the contracting officer.

[50 FR 23133, May 31, 1985, as amended at 50 FR 38004, Sept. 19, 1985]

## **Subpart 333.2—Disputes and Appeals**

SOURCE: 53 FR 15563, May 2, 1988, unless otherwise noted.

### **333.203 Applicability.**

(c) The Armed Services Board of Contract Appeals (ASBCA) has been designated by the Secretary as the authorized "Board" to hear and determine disputes for the Department.

### **333.209 Suspected fraudulent claims.**

The contracting officer shall submit any instance of a contractor's suspected fraudulent claim to the Office of the Inspector General for investigation.

### **333.210 Contracting officer's authority.**

The contracting officer shall refer a proposed final decision to the Office of General Counsel, Business and Administrative Law Division (OGC-BAL), or the Regional Attorney in the HHS regional office servicing the region in which the contracting officer is located, for advice as to the legal sufficiency and format before sending the final decision to the contractor. The

contracting officer shall provide OGC-BAL or the Regional Attorney with the pertinent documents with the submission of each proposed final decision.

### **333.211 Contracting officer's decision.**

(a)(2) See 333.210.

(a)(4)(v) When using the paragraph in FAR 33.211(a)(4)(v), the contracting officer shall insert the words "Armed Services" before each mention of the term "Board of Contract Appeals".

(c)(2) The contracting officer does not have jurisdiction to consider a claim from the contractor over \$50,000, unless that claim has been certified.

(h) At any time within the period of appeal, the contracting officer may modify or withdraw his/her final decision. If an appeal from the final decision has been taken to the ASBCA, the contracting officer will forward his/her recommended action to OGC-BAL or the cognizant Regional Attorney with the supplement to the contract file which supports the recommended correction or amendment.

### **333.212 Contracting officer's duties upon appeal.**

(a) Appeals shall be governed by the rules set forth in the "Rules of the Armed Services Board of Contract Appeals", or by the rules established by the U.S. Claims Court, as appropriate.

(b) OGC-BAL or the cognizant Regional Attorney is designated as the Government Trial Attorney to represent the Government in the defense of appeals before the ASBCA. A decision by the ASBCA will be transmitted by the Government Trial Attorney to the appropriate contracting officer for compliance in accordance with the ASBCA's decision.

(c) If an appeal is filed with the ASBCA, the contracting officer shall assemble a file within 30 days of receipt of an appeal, or advice that an appeal has been filed, that consists of all documents pertinent to the appeal, including:

(1) The decision and findings of fact from which the appeal is taken;

(2) The contract, including specifications and pertinent modifications, plans and drawings;

(3) All correspondence between the parties pertinent to the appeal, including the letter or letters of claims in response to which the decision was issued;

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(5) Any additional information considered pertinent.

The contracting officer shall furnish the appeal file to the Government Trial Attorney for review and approval. After approval, the contracting officer shall prepare four copies of the file, one for the ASBCA, one for the appellant, one for the Government Trial Attorney, and one for the contracting office.

(d) At all times after the filing of an appeal, the contracting officer shall render whatever assistance is requested by the Government Trial Attorney. When an appeal is set for hearing, the concerned contracting officer, acting under the guidance of the Government Trial Attorney, shall be responsible for arranging for the presence of Government witnesses and specified physical and documentary evidence at both the pre-hearing conference and the hearing.

(e) If a contractor which has filed an appeal with the ASBCA elects to accept fully the decision from which the appeal was taken, or any modification to it, and gives written notification of acceptance to the Government Trial Attorney or the concerned contracting officer, the Government Trial Attorney will notify the ASBCA of the disposition of the dispute in accordance with Rule 27 of the ASBCA.

(f) If the contractor has elected to appeal to the U.S. Claims Court, the U.S. Department of Justice will represent the Department. However, the contracting officer shall still coordinate all actions through OGC-BAL.

#### 333.212-70 Formats.

(a) The following format is suggested for use in transmitting appeal files to the ASBCA:

Your reference:

(Docket No.)

(Name)

Recorder, Armed Services Board of Contracts Appeals, Skyline Six, 5109 Leesburg Pike, Falls Church, Virginia 22041.

Dear (Name):

Transmitted herewith are documents relative to the appeal under Contract No. \_\_\_\_\_ with the (name of contractor), in accordance with the procedures under Rule 4.

The Government Trial Attorney for this case is (Insert Division of Business and Administrative Law, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue SW., Washington, DC 20201, or Regional Attorney and office address, as appropriate).

The request for payment of charges resulting from the processing of this appeal should be addressed to: (Insert name and address of cognizant finance office.)

Sincerely yours,

Contracting Officer

Enclosures

(b) The following format is suggested for use in notifying the appellant that the appeal file was submitted to ASBCA:

(Contractor Address)

Dear \_\_\_\_\_:

An appeal file has been compiled relative to the appeal under Contract No. \_\_\_\_\_, and has been submitted to the Armed Services Board of Contract Appeals (ASBCA). The enclosed duplicate of the appeal file is identical to that submitted to the Board, except that contract documents which you already have may have been excluded.

You may furnish or suggest any additional information deemed pertinent to the appeal to the Armed Services Board of Contract Appeals according to their rules.

The ASBCA will provide you with further information concerning this appeal.

Sincerely yours,

Contracting Officer

Enclosure

#### 333.213 Obligation to continue performance.

(a) The Disputes clause at FAR 52.233-1 shall be used without the use of Alternate I. However, if the contracting officer determines that the Government's interest would be better served by use of paragraph (h) in Alternate I, he/she must request approval for its

**333.214**

**48 CFR Ch. 3 (10-1-97 Edition)**

use from the Director, Division of Acquisition Policy (through normal acquisition channels).

[53 FR 15563, May 2, 1988, as amended at 54 FR 24344, June 7, 1989]

**333.214 Contract clause.**

The clause at FAR 52.233-1 shall be used in all circumstances except as indicated in 333.213.

## SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

### PART 334—MAJOR SYSTEM ACQUISITION

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

#### **334.003 Agency head responsibilities.**

The Department's implementation of OMB Circular No. A-109 may be found in Chapter 1-150 of the General Administration Manual.

[49 FR 14020, Apr. 9, 1984]

### PART 335—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.

335.070 Cost-sharing.

335.070-1 Policy.

335.070-2 Amount of cost-sharing.

335.070-3 Method of cost-sharing.

335.070-4 Institutional cost-sharing agreements.

335.070-5 Contract clauses.

335.070-6 Contract award.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 14020, Apr. 9, 1984, unless otherwise noted.

#### **335.070 Cost-sharing.**

##### **335.070-1 Policy.**

(a) In addition to utilizing cost-sharing type contracts when required by statute, the desirability of utilizing this type of contract, when authorized should also be considered under certain circumstances when not required by statute. Contractors should be encouraged to contribute to the cost of performing research where there is a probability that the contractor will receive present or future benefits from participation, such as, increased technical know-how, training to employees, acquisition of equipment, use of background knowledge in future contracts, etc. Cost-sharing is intended to serve the mutual interest of the Government and the performing organization by helping to assure efficient utilization of the resources available for the conduct of research projects and by promoting sound planning and prudent fiscal policies by the performing organization. If cost-sharing is not required

by statute, encouragement should be given to organizations to contribute to the cost of performing research under research contracts unless the contracting officer determines that a request for cost-sharing would not be appropriate because of the following circumstances:

(1) The particular research objective or scope of effort for the project is specified by the Government rather than proposed by the performing organization. This would usually include any formal Government requests for proposals for a specific project.

(2) The research effort has only minor relevance to the non-Federal activities of the performing organization, and the organization is proposing to undertake the research primarily as a service to the Government.

(3) The organization has little or no non-Federal sources or funds from which to make a cost contribution. Cost-sharing should generally not be requested if cost-sharing would require the Government to provide funds through some other means (such as fees) to enable the organization to cost-share. It should be recognized that those organizations which are predominantly engaged in research and development and have little or no production or other service activities may not be in a favorable position to make a cost contribution.

(b) Cost-sharing may be negotiated in either of two ways. When cost-sharing is negotiated on a contract by contract basis, the responsibility for negotiating the cost-sharing arrangement is that of the contracting officer. In the case of institutional cost-sharing arrangements (see 335.070-4), the responsibility for negotiating cost-sharing is that of the Office of the Assistant Secretary for Health. Each research contract file should show whether the contracting officer considered cost-sharing appropriate for that particular contract and, except when an institutional cost-sharing agreement is applicable, in what amount. If cost-sharing was not considered appropriate, the file must indicate the factual basis for that decision, e.g., "Because the contractor will derive no

benefits from this award that can be applied to its commercial activities, cost-sharing is not considered appropriate.” The contracting officer may wish to coordinate with the project officer before documenting this decision.

(c) If the contracting officer considers cost-sharing to be appropriate for a research contract and the contractor refuses to accept this type of contract, the award may be made without cost-sharing, except when cost-sharing is required by statute, if the contracting officer concludes that payment of the full cost of the research effort is necessary in order to obtain the services of that particular contractor.

[49 FR 14020, Apr. 9, 1984; 49 FR 36110, Sept. 14, 1984]

#### **335.070-2 Amount of cost-sharing.**

When cost-sharing is required by statute or determined to be appropriate, the following guidelines shall be utilized in determining the amount of cost participation by the contractor, except where an institutional cost-sharing agreement is applicable:

(a) Cost participation by educational institutions and other not-for-profit or nonprofit organizations should normally be at least 1 percent of the total project cost. In many cases, cost-sharing of less than 5 percent of the total project cost would be appropriate in view of the organizations’ nonprofit status and their normally limited ability to recover the cost of such participation from non-Federal sources. However, in some cases, it may be appropriate for educational institutions to provide a higher degree of cost-sharing, such as when the cost of the research consists primarily of the academic year salary of faculty members (or when the equipment acquired by the institution for the project will be of significant value to the institution in its educational activities). The percentages stated above are not intended as a substitution for those set forth in any legislation and are not to be used in lieu of those contained in that legislation.

(b) The amount of cost participation by commercial or industrial organizations should depend to a large extent on whether the research effort or results are likely to enhance the per-

forming organization’s capability, expertise, or competitive position, and the value of such enhancement to the performing organization. It should be recognized that those organizations which are predominantly engaged in research and development and have little or no production or other service activities may not be in a favorable position to derive a monetary benefit from their research under Federal agreements. Therefore, cost participation by commercial or industrial organizations could reasonably range from as little as 1 percent or less of the total project cost, to more than 50 percent of the total project cost.

(c) If the performing organization will not acquire title to or the right to use inventions, patents, or technical information resulting from the research project, it would generally be appropriate to obtain less cost-sharing than in cases in which the performer acquires such rights.

(d) When cost-sharing is required by statute, cost participation of less than 1 percent may be appropriate if consistent with the provisions of the statute, and:

(1) A formal request for proposal is issued;

(2) The contractor proposes to perform the research primarily as a service to the Government; or

(e) The contractor has little or no non-Federal sources of funds from which to make a cost contribution.

(3) A fee or profit will usually not be paid to the performing organization if the organization is to contribute to the cost of the research effort, but the amount of cost-sharing may be reduced to reflect the fact that the organization is foregoing its normal fee or profit in the research. However, if the research is expected to be of only minor value to the performing organization and if cost-sharing is not required by statute, it may be appropriate for the performer to make a contribution in the form of a reduced fee or profit rather than sharing the costs of the project.

(f) The organization’s participation may be considered over the total term of the project so that a relatively high contribution in one year may be offset

by a relatively low contribution in another.

(g) A relatively low degree of cost-sharing may be appropriate if, in the view of the operating divisions or their subordinate elements, an area of research requires special stimulus in the national interest.

(h) In the final analysis, the amount of cost participation should reflect the mutual agreement of the parties, provided that it is consistent with any statutory requirements.

### **335.070-3 Method of cost-sharing.**

Cost-sharing on individual contracts may be accomplished either by a contribution of part or all of one or more elements of allowable cost of the work being performed, or by a fixed amount or stated percentage of the total allowable costs of the project. Costs so contributed may not be charged to the Government under any other grant or contract (including allocations to other grants or contracts as part of any independent research and development program).

[49 FR 14020, Apr. 9, 1984. Correctly designated at 49 FR 36110, Sept. 14, 1984]

### **335.070-4 Institutional cost-sharing agreements.**

(a) An institutional cost-sharing agreement covers the aggregate of some or all of the research projects supported by HHS research contracts and grants at a given performing organization. With respect to contracts, these agreements will apply only to cost-sharing type contracts resulting from unsolicited proposals and awarded without fee or profit. Eligibility for institutional cost-sharing agreements is limited to nonprofit institutions of higher education and other public or private nonprofit or not-for-profit organizations. Usually, a single agreement will cover all applicable research projects at a given performing organization; however, in unusual cases, separate agreements for individual departments or locations of the performing organization may be negotiated if deemed advantageous.

(b) The institutional cost-sharing agreements establish an overall sharing ratio applicable to the aggregate of all covered projects. Individual awards

will incorporate the institutional agreement by reference, but will not establish a specific sharing ratio for the individual project. The amount of sharing on any particular project will therefore be left to the discretion of the performing organization, and relatively high contributions on some projects may offset relatively low contributions on other projects, provided that the agreed aggregate contribution is made during each of the contractor's fiscal years, and a contribution, even if nominal, is made to each covered project.

(c) The Public Health Service shall be responsible for negotiating all HHS institutional cost-sharing agreements. Agreements, when negotiated, will be binding upon all HHS activities. Eligible contractors wishing to negotiate institutional cost-sharing agreements should contact the Division of Grants and Contracts, Office of Resource Management, Public Health Service, Room 18 A 19, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857.

(1) All necessary implementing instructions to cover matters such as content of proposals, format of agreements, documentation, etc. shall be issued by the Public Health Service, subject to the prior approval of the Office of Acquisition and Grants Management.

(2) The Public Health Service shall provide the Office of Acquisition and Grants Management, and the Department's operating divisions with current listings of all institutional cost-sharing agreements, indicating the date on which they became effective with respect to contracts. Copies of individual agreements will be made available to the Department's other activities upon request. Each activity shall designate only one individual who shall be authorized to make such requests.

(d) The amount of cost-sharing negotiated under an institutional cost-sharing agreement will be determined in accordance with the appropriate guidelines contained in "A Guide to Institutional Cost Sharing Agreements" issued by the Office of Resource Management, PHS. The extent to which the performing organization shared in the costs of HHS-sponsored research in the

past, and its anticipated ability to do so in the future, should also be taken into account.

[49 FR 14020, Apr. 9, 1984, as amended at 54 FR 24344, June 7, 1989]

### **335.070-5 Contract clauses.**

Clauses for cost sharing in individually negotiated contracts or under institutional agreements are set forth in 352.232-71.

### **335.070-6 Contract award.**

In consonance with the Department's objectives of competition and support of the small business program, award of contracts should not be made solely on the basis of ability or willingness to cost-share. Awards should be made primarily on the contractor's competence and only after adequate competition has been obtained among large and small business organizations whenever possible. The offeror's willingness to share costs should not be considered in the technical evaluation process but as a business consideration, which is secondary to selecting the best qualified source.

## **PART 337—SERVICE CONTRACTING**

### **Subpart 337.1—Service Contracts—General**

Sec.

337.101 Definitions.

337.103 Contracting officer responsibility.

337.104 Personal services contracts.

337.109 Services of quasi-military armed forces.

### **Subpart 337.2—Consulting Services**

337.204 Policy.

337.270 Consulting services reporting.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 14022, Apr. 9, 1984, unless otherwise noted.

### **Subpart 337.1—Service Contracts—General**

#### **337.101 Definitions.**

*Service contract.* A contract may require the furnishing of both property and services, such as a research and development contract which requires a final report. In a case such as this, this

subpart will apply to the extent that the furnishing of services is involved. Other examples of service contracts include training and education, surveys and data collection, data processing, medical services, and stenographic services.

#### **337.103 Contracting officer responsibility.**

(b) Contract actions for the services of experts and consultants are also exempt from the requirements of FAR Part 37.103(a)(3); they are to be certified in accordance with the provisions in General Administration Manual Chapter 8-15.

(c) For negotiated acquisitions, the determination shall be included as a statement in the negotiation memorandum. For sealed bid acquisitions, the determination shall be included as a separate statement in the contract file.

(d) In most cases, gathering the information and data on which to base the determination should be a joint effort between contracting and program personnel. The contracting officer shall request the advice of the Office of General Counsel and/or the personnel office before processing any request to acquire services if there is doubt as to whether an employer-employee relationship would be involved in performance of the contract.

[49 FR 14022, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

#### **337.104 Personal services contracts.**

(a) As indicated in FAR 37.104, the paramount consideration in determining if an employer-employee relationship exists is the presence of direction or supervision by Government personnel of contractor employees, as a result of either the inherent nature of the service or the manner in which the service is provided. A personal service relationship exists if this direction or supervision is necessary to:

(1) Adequately protect the Government's interest;

(2) Retain control of the function involved; and/or

(3) Retain full personal responsibility by a duly authorized Federal officer or employee for the function supported.

(c)(2) The degree of supervision necessary to establish an employer-employee relationship is relatively continuous, close supervision. Sporadic supervision is not sufficient to constitute an employer-employee relationship. (In determining whether the Government rather than the contractor exercises "relatively continuous, close supervision" of contractor personnel, the fact that an engineer, for example, may require less supervision and may exercise more independence of judgment than a food service worker is not itself determinative. If the Government takes over that degree of supervision that the contractor would otherwise exercise over either individual, the relationship created between the Government and either individual is tantamount to that of employer and employee.)

(d) The likelihood of the existence of an employer-employee relationship increases as the number and extent of the elements in FAR 37.104(d) increases. However, the mere existence of these elements does not constitute an employer-employee relationship unless continuous, close supervision exists. In determining the presence of the referenced elements, relevant factors including the following shall be considered:

(1) *The nature of the work.* (i) If the Government can use Federal personnel to perform the required work, or if the Government has rights to the specialized knowledge or equipment which is needed to perform the work;

(ii) Whether the services represent the discharge of a Government function which calls for the exercise of personal judgment and discretion on behalf of the Government. (This factor, if present in sufficient degree, may alone render the service personal in nature.); and/or

(iii) If the services are to be a one-time occurrence (or a continuing requirement of short term duration).

(2) *Contractual provisions concerning the contractor's employees.* (i) To what extent the Government specifies the qualifications of, or has the right to approve, individual contractor employees (other than the Government's right to approve or disapprove new key personnel, remove key personnel, grant or

deny security clearances, and provide for necessary health qualifications). (Also, it is permissible for the Government to specify the technical and experience qualifications of contractor employees, if this is necessary to assure satisfactory performance.);

(ii) To what extent the Government can assign tasks to, and prepare work schedules for, contractor employees during performance of the contract. (This does not preclude inclusion in the contract of work schedules for the contractor—but not individual employees—or the establishment of a time of performance for orders issued under a requirement or other indefinite delivery-type contract.);

(iii) To what extent the Government can supervise or control the method in which the contractor performs the service, the number of people that will be employed, the specific duties of individual employees, and similar details. (However, it is permissible to require that contractor employees comply with regulations for the protection of life and property. Also, it is permissible to recommend a specific number of people the contractor may employ, if this is necessary to assure performance; but in that event, the contract must specify that this does not in any way minimize the contractor's obligation to use as many employees as are necessary for proper contract performance.);

(iv) If the Government can review performance of each individual contractor employee (as opposed to reviewing the final product after completion of the work.); and/or

(v) If the Government has the right to have contractor employees removed from the job for reasons other than misconduct or security.

(3) *Other provisions of the contract.* (i) Whether the contractor undertakes a specific task or project that is definable either at the inception of the contract or at some point during performance, or whether the work is defined on a day-to-day basis. (However, this does not preclude use of a requirement or other indefinite delivery-type contract, provided the nature of the work is specifically described in the contract, and orders are formally issued to the contractor rather than to individual employees.);

(ii) Whether payment will be for results accomplished or solely according to time worked. (This is a factor which might be useful in a doubtful case, but should not in itself create doubt about services which are otherwise clearly nonpersonal.); and/or

(iii) Whether Government office or working space, facilities, equipment, and supplies will be used for contract performance. (This is a factor which might be useful in a doubtful case, but should not in itself create doubt about services which are otherwise clearly nonpersonal.).

(4) *Administration of the contract.* (i) If contractor employees are used interchangeably with Government personnel; and/or

(ii) If contractor employees are integrated into the Government's organizational structure.

(e) and (f) Reserved.

(g) The following are examples of personal and nonpersonal services, but are illustrative only and are not to be used as the basis for determination in any specific case.

(1) The following are examples of personal services contracts:

(i) A contract to furnish ordinary, day-to-day, stenographic and secretarial services in a Government office under direct Government supervision.

(ii) A contract for the testing of a substance where the project officer visits the contractor's facility several times each week to consult with the principal investigator, review data, specify methods of quality control, specify testing to be done, and provide instruction to investigators.

(iii) A contract for the performance of a function which management must perform in order to retain essential control over the conduct of agency programs (e.g., negotiating contract amounts).

(2) The following are examples of nonpersonal services contracts:

(i) A contract for technical assistance work requiring specialized equipment and trained personnel unavailable to the Government. The contractor performs work described in the contract free of Government supervision, and does not act on behalf of the Government.

(ii) A contract with an individual for delivery of lectures without Government supervision (even if they are to be given on specific dates, or on specialized subjects, or if payment will be by the hour).

(iii) A fixed price contract for janitorial services which provides for specific tasks to be performed in specific places, free of Government direction, supervision, and control over the contractor's employees.

(iv) A research and development contract providing for a level of effort which will be performed by the contractor independent of Government direction, supervision, and control.

#### **337.109 Services of quasi-military armed forces.**

As distinguished in FAR 37.109, solicitations for protective services shall include the following certification:

The bidder/offeror certifies it is not a detective agency, nor an employee of such agency as contemplated by 5 U.S.C. 3108.

### **Subpart 337.2—Consulting Services**

#### **337.204 Policy.**

General Administration Manual Chapter 8-15 prescribes policies and procedures concerning approvals required before contracting for expert or consulting services.

(e) Services of experts or consultants may be acquired by contract only when:

(1) The services will be nonpersonal in nature, are critical to the planning, development, operation, or evaluation of a Department program, cannot be accomplished by Government employees, and are economically available from the private sector; or

(2) The performance of the work by a consultant is directed by statute.

#### **337.270 Consulting services reporting.**

The clause set forth in 352.237-70 shall be included in every contract for expert or consulting services.

## PART 339—MANAGEMENT, ACQUISITION, AND USE OF INFORMATION RESOURCES

### Subpart 339.70—ADP Clearances and Systems Security

Sec.

339.7001 ADP Clearances.

339.7002 ADP systems security.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486 (c).

SOURCE: 49 FR 14023, Apr. 9, 1984, unless otherwise noted.

### Subpart 339.70—ADP Clearances and Systems Security

#### 339.7001 ADP clearances.

In accordance with Chapter 4-10 of the HHS Information Resources Management (IRM) Manual, the Office of Information Resources Management (OIRM), OASMB-OS, is responsible for the review and approval of all requests for proposed automatic data processing (ADP) systems and modifications to existing ADP systems which require the acquisition of ADP hardware, software packages, and services, and telecommunications equipment, which exceed the dollar thresholds stated in Chapter 4-10.

(a) It is the responsibility of the program office to obtain written approval from OIRM on proposed ADP acquisitions which exceed the thresholds stated in Exhibit 4-10-A of Chapter 4-10 prior to submitting the request for contract to the contracting activity.

(b) The OIRM approval document (delegation of procurement authority (DPA)) is to be attached to the request for contract when it is submitted by the program office to the contracting activity. The contracting activity shall not issue a solicitation based on the request for contract until a properly executed approval document (DPA) is obtained.

[49 FR 14023, Apr. 9, 1984, as amended at 53 FR 43208, Oct. 26, 1988]

#### 339.7002 ADP systems security.

(a) *Program responsibilities.* Whenever a proposed contract action requires the design, development, maintenance, or use of an ADP system or the use of ADP resources, the program office is

required to designate a responsible individual to serve as the ADP system manager who is to ensure, in coordination with the cognizant systems security officer, that ADP security requirements are met and that each contractor maintains an acceptable security program. The project officer is responsible for setting forth the specific portions of Part 6, ADP Systems Security, of the HHS IRM Manual which are applicable to the instant acquisition.

(b) *Contracting responsibilities.* (1) The contracting officer is responsible for ensuring that a certification of ADP systems security requirements, signed by both the ADP system manager and the ADP systems security officer, is submitted with the request for contract. The contracting officer shall not initiate action on the request for contract until the properly executed certification is received. The certification will state that the security requirements specified are reasonably sufficient for the intended application and that they comply with current Federal and HHS computer security policies, procedures, standards, and guidelines.

(2) When developing the request for proposals, the contracting officer shall include in the technical proposal instructions a statement requiring that the offeror present a detailed outline of its proposed ADP system security program which complies with the requirements of the statement of work and applicable portions of Part 6, ADP Systems Security, of the HHS IRM Manual.

(3) The contracting officer shall include a special provision reading substantially as follows in all applicable solicitations and resultant contracts:

The Contractor agrees to comply with the ADP system security requirements set forth in the system of work and applicable portions of Part 6, ADP Systems Security, of the HHS IRM Manual. The Contractor further agrees to include this provision in any subcontract awarded pursuant to this prime contract.

(4) The contracting officer shall ensure that a properly executed certification confirming that the offerors comply with the necessary security requirements is attached to the technical evaluation report received from the evaluation panel before proceeding

339.7002

48 CFR Ch. 3 (10-1-97 Edition)

with the acquisition process. This certification must be countersigned by the officials designated in paragraph (b)(1)

above and must contain a similar statement of compliance.

[49 FR 14023, Apr. 9, 1984, as amended at 53 FR 43208, Oct. 26, 1988]

## SUBCHAPTER G—CONTRACT MANAGEMENT

### PART 342—CONTRACT ADMINISTRATION

#### Subpart 342.5—Postaward Orientation

Sec.

342.504 Postaward letters.

#### Subpart 342.7—Indirect Cost Rates

342.705 Final indirect cost rates.

#### Subpart 342.70—Contract Monitoring

342.7001 Purpose.

342.7002 Contract monitoring responsibilities.

342.7003 Withholding of contract payments.

342.7003-1 Policy.

342.7003-2 Procedures.

342.7003-3 Withholding payments.

#### Subpart 342.71—Administrative Actions for Cost Overruns

342.7100 Scope of subpart.

342.7101 Applicability.

342.7102 General.

342.7103 Contract administration.

342.7103-1 General.

342.7103-2 Procedures.

342.7104 Contract modifications.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 14024, Apr. 9, 1984, unless otherwise noted.

#### Subpart 342.5—Postaward Orientation

##### **342.504 Postaward letters.**

To the extent practicable, contracting officers should use letters to accomplish postaward orientation objectives. A postaward orientation conference should only be arranged when letters cannot resolve key issues.

#### Subpart 342.7—Indirect Cost Rates

##### **342.705 Final indirect cost rates.**

The Director, Division of Cost Allocation of the Regional Administrative Support Center within each HHS regional office has been delegated the authority to establish indirect cost rates, research patient care rates, and, as necessary, fringe benefit, computer, and other special costing rates for use

in contracts and grants awarded to State and local governments, colleges and universities, hospitals, and other nonprofit organizations.

#### Subpart 342.70—Contract Monitoring

##### **342.7001 Purpose.**

Contract monitoring is an essential element of contract administration and the acquisition process. This subpart describes the Department's operating concepts regarding contract monitoring, performed jointly by the project officer and the contracting officer, to ensure that the required monitoring is performed, timely remedial action is taken when necessary, and a determination is made that contract objectives have been met.

##### **342.7002 Contract monitoring responsibilities.**

(a) Upon execution of the contract, the mutual obligations of the Government and the contractor are established by, and limited to, the written stipulations in the contract. Unless authorized by the contracting officer, HHS personnel shall not direct or request the contractor to assume any obligation or take any actions not specifically required by the contract. Only the contracting officer may impose a requirement which will result in a change to the contract. All contract changes must be directed in writing or confirmed in writing by the contracting officer.

(b) The contracting officer is responsible for assuring compliance with all terms of the contract, especially the statutory, legal, business, and regulatory provisions. Whether or not a postaward conference is held, the contracting officer shall inform the contractor by letter (if not already stipulated by contract provisions) of the authorities and responsibilities of the Government personnel with whom the contractor will be dealing throughout the life of the contract.

(c) The contracting officer must depend on program, technical, and other

personnel for assistance and advice in monitoring the contractor's performance, and in other areas of postaward administration. The contracting officer must assure that responsibilities assigned to these personnel are understood and carried out. The individual roles and corresponding responsibilities typically involve, but are not limited to, the following:

(1) The role of program and technical personnel in monitoring the contract to assist or advise the contracting officer (or act as his/her representative when so designated by the contracting officer) in activities such as:

(i) Providing technical monitoring during contract performance, and issuing letters to the contractor and contracting officer relating to delivery acceptance, or rejection in accordance with the terms of the contract;

(ii) Assessing contractor performance, including inspection and testing of products and evaluation of reports and data;

(iii) Recommending necessary changes to the schedule of work and period of performance in order to accomplish the objectives of the contract. This shall be accomplished by a written request to the contracting officer, together with an appropriate justification and funds availability citation;

(iv) Reviewing invoices/vouchers and recommending approval/disapproval action by the contracting officer, to include comments regarding anything unusual discovered in the review;

(v) Reviewing and recommending approval or disapproval of subcontracts, overtime, travel, and key personnel changes; and

(vi) Participating, as necessary, in various phases of the contract closeout process.

(2) The role of the project officer in performing required aspects of the contract monitoring process. In addition to those applicable activities set forth in (c)(1) above, the project officer shall:

(i) Submit periodic reports to the contracting officer that concisely explain the status of the contract, and include recommended actions for any problems reported. Provide the contracting officer with written notification of evaluation and approval/dis-

approval of contract deliverables and of completion of tasks or phases. The contracting officer will, in turn, provide the contractor with written notification of approval or disapproval unless the responsibility has been delegated by the contracting officer, in which case the person responsible for such action will notify the contractor and provide a copy to the contracting officer for inclusion in the contract file;

(ii) Monitor the technical aspects of the contractor's business and technical progress, identify existing and potential problems that threaten performance, and immediately inform the contracting officer of deviations from contract objectives, or from any technical or delivery requirements, so that remedial measures may be instituted accordingly;

(iii) Provide immediate notification to the head of the program office responsible for the program whenever it is determined that program objectives are not being met, together with specific recommendations of action to be taken. A copy of the project officer's report and recommendations shall be transmitted to the contracting officer for appropriate action;

(iv) Submit, within 120 days after contract completion, a final assessment report to the contracting officer. The report should include an analysis of the contractor's performance, including the contract and program objectives achieved and missed. A copy of the final assessment report shall be forwarded to the head of the program office responsible for the program for management review and followup, as necessary; and

(v) Accompany and/or provide, when requested, technical support to the HHS auditor in the conduct of floor checks.

(3) The role of the contract administrator, auditor, cost analyst, and property administrator in assisting or advising the contracting officer in postaward administration activities such as:

(i) Evaluation of contractor systems and procedures, to include accounting policies and procedures, purchasing policies and practices, property accounting and control, wage and salary

plans and rate structures, personnel policies and practices, etc.;

(ii) Processing of disputes under the Disputes clause and any resultant appeals;

(iii) Modification or termination of the contract; and

(iv) Determination of the allowability of cost charges to incentive or cost-reimbursement type contracts and progress payments under fixed-price contracts. This is especially important when award is made to new organizations or those with financial weaknesses.

(d) The contracting officer is responsible for assuring that contractor performance and contract monitoring are carried out in conformance with contract provisions. If performance is not satisfactory or if problems are anticipated, it is essential that the contracting officer take immediate action to protect the Government's rights under the contract. The contracting officer shall notify his/her immediate supervisor of problems that cannot be resolved within contract limitations and whenever contract or program objectives are not met. The notification shall include a statement of action being taken by the contracting officer.

(e) Contract cost and manpower reporting shall be required on all cost-reimbursement type contracts financed under letter of credit or Departmental Federal Assistance Financing System (DFAFS) methods of payment regardless of dollar value, and on all other cost-reimbursement type contracts of \$100,000 or more. Financial reporting may be required on cost-reimbursement contracts under \$100,000, when financed by other than the letter of credit or DFAFS methods, but only if it is necessary for effective contract administration. Financial and manpower information may be submitted either as a separate contract financial report or as an addendum to a public voucher, as prescribed by the contracting officer. Frequency, format (including instructions), extent, structure (including cost elements and labor categories), and distribution of reporting fall within the discretion of the contracting officer. The contracting officer shall set forth financial reporting requirements in all applicable RFPs and contracts, shall

limit the requirements to those necessary for effectual cost and manpower management of the contract, and shall avoid the use of reporting requirements that are unduly burdensome on the contractor.

[49 FR 14024, Apr. 9, 1984, as amended at 54 FR 43966, Oct. 30, 1989; 54 FR 47750, Nov. 16, 1989]

**342.7003 Withholding of contract payments.**

**342.7003-1 Policy.**

(a) All solicitations and resultant contracts shall contain a withholding of contract payments clause and an excusable delays clause or a clause which incorporates the definition of excusable delays. These clauses are contained in the Department's contract general provisions.

(b) The transmittal letter used to convey the contract to each contractor shall contain a notice which highlights the contractor's agreement with the withholding of contract payments clause.

(c) No contract payment shall be made when any report required to be submitted by the contractor is overdue, or the contractor fails to perform or deliver work or services as required by the contract.

(d) The contracting officer shall issue a ten-day cure notice or initiate appropriate termination action for any failure in the contractor's performance as stated in the preceding paragraph (c).

**342.7003-2 Procedures.**

(a) The contracting officer is responsible for initiating immediate action to protect the Government's rights whenever the contractor fails to comply with either the delivery or reporting provisions of the contract. Compliance with the reporting provisions includes those reports to be submitted directly to the payment office. If such a report is not submitted on time, the contracting officer is to be notified promptly by the payment office.

(b) When the contract contains a termination for default clause, the contractor's failure to either submit any required report when due or perform or deliver services or work when required by the contract is to be considered a

default in performance. In either circumstance, the contracting officer is to immediately issue a formal ten-day cure notice pursuant to the default clause. The cure notice is to follow the format prescribed in FAR 49.607 and is to include a statement to the effect that contract payments will be withheld if the default is not cured or is not determined to be excusable.

(1) If the default is cured or is determined to be excusable, the contracting officer is not to initiate the withholding action.

(2) If the default is not determined to be excusable or a response is not received within the allotted time, the contracting officer is to initiate withholding action on all contract payments and is to determine whether termination for default or other action would be in the best interest of the Government.

(c) When the contract does not contain a termination for default clause, the contractor's failure to either submit any required report when due or perform or deliver services or work when required by the contract is to be considered a failure to perform. In either circumstance, the contracting officer is to immediately issue a written notice to the contractor specifying the failure and providing a period of ten days, or a longer period as determined necessary by the contracting officer, in which the contractor is to cure the failure or establish an excusable delay. The contracting officer is to include a statement in the written notice to the effect that contract payments will be withheld if the failure is not cured or is not determined to be excusable.

(1) If the failure is cured or is determined to be excusable, the contracting officer is not to initiate the withholding action.

(2) If the failure is not determined to be excusable or a response is not received within the allotted time, the contracting officer is to initiate withholding action on all contract payments and is to determine whether termination for convenience or other action would be in the best interest of the Government.

(d) The contracting officer should consult FAR Subpart 49.4 for further

guidance before taking any of the actions described in this section.

#### **342.7003-3 Withholding payments.**

(a) When making the determination that contract payments should be withheld in accordance with the Withholding of Contract Payments clause, the contracting officer is to immediately notify the servicing finance office in writing of the determination to suspend payments. The notice of suspension is to contain all elements of information required by the payment office to properly identify the contract and the applicable accounts involved.

(b) The contracting officer is to immediately notify the contractor in writing that payments have been suspended until the default or failure is cured.

(c) When the contractor cures the default or failure, the contracting officer is to immediately notify, in writing, all recipients of the notice of suspension that the suspension is to be lifted and contract payments are to be resumed.

(d) When exercising actions regarding the withholding of payment procedures, the contracting officer must be careful not to waive any of the Government's rights when corresponding with the contractor or when taking any other actions.

### **Subpart 342.71—Administrative Actions for Cost Overruns**

#### **342.7100 Scope of subpart.**

This subpart sets forth the procedures to be followed when a cost overrun is anticipated; i.e., the allowable actual cost of performing a cost-reimbursement type contract is expected to exceed the total estimated cost specified in the contract.

#### **342.7101 Applicability.**

This subpart applies to the administration of cost-reimbursement type contracts and the cost-reimbursement portion of other types of contracts. Nothing in this subpart shall be construed to relieve contractors from compliance with the Limitation of Cost clause or any other provisions of contracts.

**342.7102 General.**

Reimbursement for costs incurred under cost-reimbursement contracts shall not exceed the amount of funds obligated by the contract, unless increased by the contracting officer. Cost overruns shall be held to an absolute minimum, compatible with accomplishment of the statement of work.

**342.7103 Contract administration.****342.7103-1 General.**

Upon receipt of information that a contractor's accumulated cost and projected expenditures will exceed the limit of funds obligated by the contract, the contracting officer shall coordinate immediately with the appropriate program office to determine whether the contract should be modified or terminated. If the contracting officer receives information from a source other than the contractor that a cost overrun is anticipated, the contracting officer shall verify the information with the contractor, and remind the contractor of the notification requirements of the Limitation of Cost clause.

**342.7103-2 Procedures.**

(a) Upon notification that a cost overrun is anticipated, the contracting officer shall inform the contractor to submit a request for additional funds which is to include:

- (1) Name and address of contractor.
- (2) Contract number and expiration date.
- (3) Contract item(s) and amount(s) creating the overrun.
- (4) The elements of cost which changed from the original estimate (i.e., labor, material, travel, overhead, etc.) to be furnished in the following format:
  - (i) Original estimate,
  - (ii) Costs incurred to date,
  - (iii) Estimated cost to completion,
  - (iv) Revised estimate, and
  - (v) Amount of adjustment.
- (5) The factors responsible for the increase, i.e., error in estimate, changed conditions, etc.
- (6) The latest date by which funds must be available for commitment to avoid contract slippage, work stoppage, or other program impairment.

(b) When the contractor submits a notice of an impending overrun, the contracting officer shall:

(1) Immediately advise the appropriate program office and furnish a copy of the notice and any other data received;

(2) Request audit or cost advisory services, and technical support, as necessary, for evaluation of information and data received; and

(3) Maintain continuous follow-up with the program office in order to obtain a timely decision as to whether the work under the contract should be continued and additional funds provided, or the contract terminated. The decision of the program office must be supported by an appropriate written statement and funding authority, or a formal request for termination, when applicable. After a programming and funding decision is received from the program office, the contracting officer shall promptly notify the contractor in writing that:

(i) A specified amount of additional funds has been allotted to the contract by a contractual instrument; or

(ii) Work will be discontinued when the funds allotted to the contract have been exhausted, and that any work performed after that date is at the contractor's risk; or

(iii) The Government is considering whether additional funds should be allotted to the contract and will notify the contractor as soon as possible, but that any work performed after the funds then allocated to the contract have been exhausted is at the contractor's risk.

Timely, formal notification of the Government's intention is essential in order to preclude loss of contractual rights in the event of dispute, termination, or litigation.

(c) If program requirements permit, contracting officers should refrain from issuing any contractual documents which will require new work or an extension of time, pending resolution of an overrun or additional fund request.

**342.7104 Contract modifications.**

(a) Modifications to contracts containing the Limitation of Cost clause shall include either:

(1) A provision increasing the estimated or ceiling amount referred to in the Limitation of Cost clause of the contract and stating that the clause will thereafter apply in respect to the increase amount; or

(2) A provision stating that the estimated or ceiling amount referred to in the contract is not changed by the modification and that the Limitation of Cost clause will continue to apply with respect to the amount in effect prior to the modification.

(b) A fixed-fee provided in a contract shall not be changed when funding a cost overrun. Changes in fixed-fee will be made only to reflect changes in the scope of work which justify an increase or decrease in fee.

## **PART 345—GOVERNMENT PROPERTY**

### **Subpart 345.3—Providing Government Property to Contractors**

Sec.

345.370 Providing Government property (in general).

### **Subpart 345.4—Contractor Use and Rental of Government Property**

345.405 Contracts with foreign governments or international organizations.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 14030, Apr. 9, 1984, unless otherwise noted.

### **Subpart 345.3—Providing Government Property to Contractors**

#### **345.370 Providing Government property (in general).**

(a) A contractor may be provided Government property or allowed to acquire such property at Government expense upon determination that:

(1) No practicable or economical alternative exists; e.g., acquisition from other sources, utilization of subcontractors, rental of property, or modification of program project requirements, etc.;

(2) The Government receives adequate consideration for providing the property; or

(3) Furnishing Government property is likely to result in substantially

lower cost to the Government for the items produced or services rendered when all costs involved (e.g., transportation, installation, modification, maintenance, etc.) are compared with the cost to the Government of the contractor's use of privately-owned property.

(b) The determination that it is necessary to provide a contractor or subcontractor with property will be made by the contracting officer with the advice of the agency property official.

(c) If the program office is aware, prior to the submission of the request for contract, that it will be necessary to provide prospective contractors with property, a written justification must accompany the request for contract to the contracting activity.

### **Subpart 345.4—Contractor Use and Rental of Government Property**

#### **345.405 Contracts with foreign governments or international organizations.**

Upon the request of a foreign government or international organization, or a contractor certifying that it is acting on behalf of a foreign government or international organization, the contracting officer, with advice from the agency property official cognizant of Government property located in the United States, its possessions, or Puerto Rico, may give written approval for its use without charge on contracts or subcontracts thereunder if:

(a) The foreign government or international organization would be authorized to place the contract with the activity concerned under the Foreign Assistance Act of 1961, as amended, or such use is authorized by an agreement with the foreign government;

(b) The foreign government's placement of the contract directly with the contractor is consistent with the best interests of the United States;

(c) It appears that the foreign government will place the contract with the contractor whether or not use is authorized, and no competitive pricing advantage will accrue to the contractor by virtue of its use;

(d) The contractor agrees that no charge for the use of the property will

**Department of Health and Human Services**

**345.405**

be included in the price charged the  
foreign government under the contract;  
and

(e) The use will not interfere with  
foreseeable requirements of the United  
States.

## SUBCHAPTER H—CLAUSES AND FORMS

### PART 352—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

#### Subpart 352.2—Texts of Provisions and Clauses

Sec.

- 352.202-1 Definitions.
- 352.215-12 Restriction on disclosure and use of data.
- 352.215-71 [Reserved]
- 352.215-72 Pre-proposal conference.
- 352.216-70 Negotiated overhead rates—fixed.
- 352.216-72 Additional cost principles.
- 352.224-70 Confidentiality of information.
- 352.228-7 Insurance—Liability to third persons.
- 352.232-9 Withholding of contract payments.
- 352.232-71 Cost sharing.
- 352.232-73 Method of payment—letter of credit.
- 352.232-74 Estimated cost and fixed fee-incrementally funded contract.
- 352.232-75 Incremental funding.
- 352.233-70 Litigation and claims.
- 352.237-70 Consulting services reporting.
- 352.242-71 Final decisions on audit findings.
- 352.242-72—352.242-79 [Reserved]
- 352.249-14 Excusable delays.
- 352.270-1 Accessibility of meetings, conferences, and seminars to persons with disabilities.
- 352.270-2 Indian preference.
- 352.270-3 Indian preference program.
- 352.270-4 Pricing of adjustments.
- 352.270-5 Key personnel.
- 352.270-6 Publication and publicity.
- 352.270-7 Paperwork Reduction Act.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 14031, Apr. 9, 1984, unless otherwise noted.

#### Subpart 352.2—Texts of Provisions and Clauses

##### 352.202-1 Definitions.

Insert the following clause in all solicitations and resultant contracts instead of the clause in FAR 52.202-1 except when contemplating (a) a fixed price research and development contract that is expected to be \$2,500 or less or (b) a purchase order.

##### DEFINITIONS (APR 1984)

(a) The term *Secretary or Head of the Agency* (also called *Agency Head*) means the Secretary, Under Secretary, or any Assistant Secretary, Administrator or Commissioner,

of the Department of Health and Human Services; and the term "his/her duly authorized representative" means any person, persons, or board authorized to act for the Secretary.

(b) The term *Contracting Officer* means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.

(c) The term *Project Officer* means the person representing the Government for the purpose of technical monitoring of contract performance. The Project Officer is not authorized to issue any instructions or directions which effect any increases or decreases in the scope of work or which would result in the increase or decrease of the price of this contract or a change in the delivery dates or performance period of this contract.

(d) The term *Department* means the Department of Health and Human Services.

(e) Except as otherwise provided in this contract, the term *subcontract* includes purchase order under this contract.

(End of clause)

*Alternate I* (Apr 1984). For cost-reimbursement contracts other than purchase orders, delete paragraph (c) above and replace with the following paragraph (c):

(c) The term *Project Officer* means the person representing the Government for the purpose of technical monitoring of contract performance. The Project Officer is not authorized to issue any instructions or directions which effect any increases or decreases in the scope of work or which would result in the increase or decrease of the cost of this contract or a change in performance period of this contract. In addition, the Project Officer is not authorized to receive or act upon the Contractor's notification of a revised cost estimate pursuant to the Limitation of Cost or Limitation of Funds clause of this contract.

[49 FR 14031, Apr. 9, 1984, as amended at 53 FR 15564, May 2, 1988]

##### 352.215-12 Restriction of disclosure and use of data.

Insert the following provision in all requests for proposals, and all requests for quotations other than those for information or planning purposes. This provision shall be used in lieu of the provision in FAR 52.215-12.

## Department of Health and Human Services

352.216-70

### RESTRICTION ON DISCLOSURE AND USE OF DATA (APR 1984)

The proposal submitted in response to this request may contain data (trade secrets; business data, e.g., commercial information, financial information, and cost and pricing data; and technical data) which the offeror, including its prospective subcontractor(s), does not want used or disclosed for any purpose other than for evaluation of the proposal. The use and disclosure of any data may be so restricted; *provided*, that the Government determines that the data is not required to be disclosed under the Freedom of Information Act, 5 U.S.C. 552, as amended, and the offeror marks the cover sheet of the proposal with the following legend, specifying the particular portions of the proposal which are to be restricted in accordance with the conditions of the legend. The Government's determination to withhold or disclose a record will be based upon the particular circumstances involving the record in question and whether the record may be exempted from disclosure under the Freedom of Information Act:

Unless disclosure is required by the Freedom of Information Act, 5 U.S.C. 552, as amended, (the Act) as determined by Freedom of Information (FOI) Officials of the Department of Health and Human Services, data contained in the portions of this proposal which have been specifically identified by page number, paragraph, etc. by the offeror as containing restricted information shall not be used or disclosed except for evaluation purposes. The offeror acknowledges that the Department may not be able to withhold a record (data, document, etc.) nor deny access to a record requested pursuant to the Act and that the Department's FOI Officials must make that determination. The offeror hereby agrees that the Government is not liable for disclosure if the Department has determined that disclosure is required by the Act.

If a contract is awarded to the offeror as a result of, or in connection with, the submission of this proposal, the Government shall have the right to use or disclose the data to the extent provided in the contract. Proposals not resulting in a contract remain subject to the Act.

The offeror also agrees that the Government is not liable for disclosure or use of unmarked data and may use or disclose the data for any purpose, including the release of the information pursuant to requests under the Act.

The data subject to this restriction are contained in pages (insert page numbers, paragraph designations, etc. or other identification).

In addition, the offeror should mark each page of data it wishes to restrict with the following legend:

Use or disclosure of data contained on this page is subject to the restriction on the cover sheet of this proposal or quotation.

Offerors are cautioned that proposals submitted with restrictive legends or statements differing in substance from the above legend may not be considered for award. The Government reserves the right to reject any proposal submitted with a nonconforming legend.

(End of provision)

### 352.215-71 [Reserved]

### 352.215-72 Pre-proposal conference.

If a pre-proposal conference is to be held as indicated in FAR 15.409, insert the following provision in the affected solicitation:

#### PRE-PROPOSAL CONFERENCE (APR 1984)

A pre-proposal conference will be held with prospective offerors at (insert local prevailing time) on (insert date) in room (insert room number) at (insert name and location of building).

The pre-proposal conference will be held for the purpose of providing information concerning the Government's requirements which may be helpful in the preparation of proposals and for answering any questions which you have regarding this solicitation.

The success of this type of conference depends largely on the leadtime available to the Government for research in connection with questions submitted by prospective offerors. Therefore, you are requested to mail written questions concerning any areas of uncertainty which, in your opinion, require clarification or correction, in sufficient time to be received on or before (insert date).

Your questions should be submitted to the Contract-Officer, (insert name of Contracting Officer), and the envelope should be marked "Pre-Proposal Conference, RFP No. (insert number of RFP)." A set of questions and answers will be furnished to all prospective offerors whether or not they are in attendance.

Because of space limitations, each prospective offeror will be limited to a total of (insert number) representatives.

Attendance at the pre-proposal conference is recommended; however, attendance is not a prerequisite for proposal submission and will not be considered a factor in proposal evaluation.

(End of provision)

### 352.216-70 Negotiated overhead rates—fixed.

Insert the following clause in all cost-reimbursement contracts with

educational institutions and nonprofit organizations when fixed rates subject to carryforward adjustments are used.

NEGOTIATED OVERHEAD RATES—FIXED (APR 1984)

(a) Notwithstanding the provisions of the clause entitled "Allowable Cost and Payment," the allowable indirect costs under this contract shall be obtained by applying negotiated fixed overhead rates for the applicable period(s) to bases agreed upon by the parties, as specified below. A negotiated fixed rate(s) is based on an estimate of the costs which will be incurred during the period for which the rate(s) applies. When the application of the negotiated fixed rates against the actual bases during a given fiscal period produces an amount greater or less than the indirect costs determined for such period, such greater or lesser amount(s) will be carried forward to a subsequent period.

(b) The Contractor, as soon as possible but no later than six months after the close of its fiscal year, or such other period as may be specified in the contract, shall submit to the Secretary or the duly authorized representative, with a copy to the cognizant audit activity, a proposed fixed overhead rate or rates based on the Contractor's actual cost experience during the fiscal year, including adjustment, if any, for amounts carried forward, together with supporting cost data. Negotiation of fixed overhead rates, including carryforward adjustments, if any, by the Contractor and the Secretary, or the duly authorized representative, shall be undertaken as promptly as practicable after receipt of the Contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with Part 31 of the Federal Acquisition Regulation (FAR) as in effect on the date of this contract.

(d) The results of each negotiation shall be set forth in an amendment to this contract, which shall specify: (1) The agreed fixed overhead rates, (2) the bases to which the rates apply, (3) the fiscal year, unless the parties agreed to a different period, for which the rates apply, and (4) the specific items treated as direct costs or any changes in the items previously agreed to be direct costs.

(e) Pending establishment of fixed overhead rates for any fiscal year or different period agreed to by the parties, the Contractor shall be reimbursed either at the rates fixed for the previous fiscal year or other period or at billing rates acceptable to the Contracting Officer, subject to appropriate adjustment when the final rates for that fiscal year or other period are established.

(f) Any failure of the parties to agree on any fixed overhead rate or rates or to the amount of any carryforward adjustment

under this clause shall not be considered a dispute concerning a question of fact for decision by the Contracting Officer within the meaning of the "Disputes" clause of this contract. If for any fiscal year or other period specified in the contract, the parties fail to agree to a fixed overhead rate or rates, it is agreed that the allowable indirect costs under this contract shall be obtained by applying negotiated final overhead rates in accordance with the terms of the "Allowable Cost and Payment" clause set forth in FAR 52.216-7, as in effect on the date of this contract.

(g) Submission of proposed fixed, provisional, and/or final overhead rates, together with appropriate data in support thereof, to the Secretary or the duly authorized representative and agreements on fixed, provisional, and/or final overhead rates entered into between the Contractor and the Secretary or the duly authorized representative, as evidenced by Negotiated Overhead Rate Agreements signed by both parties, shall be deemed to satisfy the requirements of paragraphs (b), (d), and (e), of this clause.

(End of clause)

**352.216-72 Additional cost principles.**

As prescribed in 316.307(j), insert the following clause in all solicitations and resultant cost-reimbursement contracts with nonprofit organizations, as identified in OMB Circular A-122.

ADDITIONAL COST PRINCIPLES (OCT 1990)

(a) *Bid and proposal costs.* (1) Bid and proposal costs are the immediate costs of preparing bids, proposals, and applications for potential Federal and non-Federal contracts, grants, and agreements, including the development of scientific, cost, and other data needed to support the bids, proposals, and applications.

(2) Bid and proposal costs of the current accounting period are allowable as indirect costs.

(3) Bid and proposal costs of past accounting periods are unallowable in the current period. However, if the organization's established practice is to treat these costs by some other method, they may be accepted if they are found to be reasonable and equitable.

(4) Bid and proposal costs do not include independent research and development costs covered by the following paragraph, or preaward costs covered by paragraph 33 of Attachment B to OMB Circular A-122.

(b) *Independent research and development costs.* (1) Independent research and development is research and development conducted by an organization which is not sponsored by Federal or non-Federal contracts, grants, or other agreements.

(2) Independent research and development shall be allocated its proportionate share of indirect costs on the same basis as the allocation of indirect costs to sponsored research and development.

(3) The costs of independent research and development, including its proportionate share of indirect costs, are unallowable.

(End of clause)

[55 FR 42197, Oct. 18, 1990]

### **352.224-70 Confidentiality of information.**

The following clause is covered by the policy set forth in subpart 324.70 and is to be used in accordance with the instructions set forth in 324.7004.

#### **CONFIDENTIALITY OF INFORMATION (APR 1984)**

(a) Confidential information, as used in this clause, means (1) information or data of a personal nature about an individual, or (2) proprietary information or data submitted by or pertaining to an institution or organization.

(b) In addition to the types of confidential information described in (a)(1) and (2) above, information which might require special consideration with regard to the timing of its disclosure may derive from studies or research, during which public disclosure of preliminary unvalidated findings could create erroneous conclusions which might threaten public health or safety if acted upon.

(c) The Contracting Officer and the Contractor may, by mutual consent, identify elsewhere in this contract specific information and/or categories of information which the Government will furnish to the Contractor or that the Contractor is expected to generate which is confidential. Similarly, the Contracting Officer and the Contractor may, by mutual consent, identify such confidential information from time to time during the performance of the contract. Failure to agree will be settled pursuant to the "Disputes" clause.

(d) If it is established elsewhere in this contract that information to be utilized under this contract, or a portion thereof, is subject to the Privacy Act, the Contractor will follow the rules and procedures of disclosure set forth in the Privacy Act of 1974, 5 U.S.C. 552a, and implementing regulations and policies, with respect to systems of records determined to be subject to the Privacy Act.

(e) Confidential information, as defined in (a)(1) and (2) above, that is information or data of a personal nature about an individual, or proprietary information or data submitted by or pertaining to an institution or organization, shall not be disclosed without the prior written consent of the individual, institution, or organization.

(f) Written advance notice of at least 45 days will be provided to the Contracting Officer of the Contractor's intent to release findings of studies or research, which have the possibility of adverse effects on the public or the Federal agency, as described in (b) above. If the Contracting Officer does not pose any objections in writing within the 45-day period, the Contractor may proceed with disclosure. Disagreements not resolved by the Contractor and the Contracting Officer will be settled pursuant to the "Disputes" clause.

(g) Whenever the Contractor is uncertain with regard to the proper handling of material under the contract, or if the material in question is subject to the Privacy Act or is confidential information subject to the provisions of this clause, the Contractor should obtain a written determination from the Contracting Officer prior to any release, disclosure, dissemination, or publication.

(h) Contracting Officer determinations will reflect the results of internal coordination with appropriate program and legal officials.

(i) The provisions of paragraph (e) of this clause shall not apply when the information is subject to conflicting or overlapping provisions in other Federal, State or local laws.

(End of clause)

### **352.228-7 Insurance—Liability to third persons.**

As prescribed in 328.311-2, contracting officers shall include the following clause in all cost-reimbursement contracts, in lieu of the clause at FAR 52.228-7:

#### **INSURANCE—LIABILITY TO THIRD PERSONS (DEC. 1991)**

(a)(1) Except as provided in subparagraph (2) immediately following, or in paragraph (h) of this clause (if the clause has a paragraph (h)), the Contractor shall provide and maintain workers' compensation, employer's liability, comprehensive general liability (bodily injury), comprehensive automobile liability (bodily injury and property damage) insurance, and such other insurance as the Contracting Officer may require under this contract.

(2) The Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program; *Provided That*, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.

(3) All insurance required by this paragraph shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with insurers approved by the Contracting Officer.

(b) The Contractor agrees to submit for the Contracting Officer's approval, to the extent

and in the manner required by the Contracting Officer, any other insurance that is maintained by the Contractor in connection with performance of this contract and for which the Contractor seeks reimbursement.

(c) Except as provided in paragraph (h) of this clause (if the clause has a paragraph (h)), the Contractor shall be reimbursed—

(1) For that portion (i) of the reasonable cost of insurance allocable to this contract, and (ii) required or approved under this clause; and

(2) For certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise within the funds available under the Limitation of Cost or the Limitation of Funds clause of this contract. These liabilities must arise out of the performance of this contract, whether or not caused by the negligence of the Contractor or of the Contractor's agents, servants, or employees, and must be represented by final judgments or settlements approved in writing by the Government. These liabilities are for—

(i) Loss of or damage to property (other than property owned, occupied, or used by the Contractor, rented to the Contractor, or in the care, custody, or control of the Contractor); or

(ii) Death or bodily injury.

(d) The Government's liability under paragraph (c) of this clause is limited to the amounts reflected in final judgments, or settlements approved in writing by the Government, but in no event to exceed the funds available under the Limitation of Cost or Limitation of Funds clause of this contract. Nothing in this contract shall be construed as implying that, at a later date, the Government will request, or the Congress will appropriate, funds sufficient to meet any deficiencies.

(e) The Contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities)—

(1) For which the Contractor is otherwise responsible under the express terms of any clause specified in the Schedule or elsewhere in the contract;

(2) For which the Contractor has failed to insure or to maintain insurance as required by the Contracting Officer; or

(3) That result from willful misconduct or lack of good faith on the part of the Contractor's directors, officers, managers, superintendents, or other representatives who have supervision or direction of—

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed; or

(iii) A separate and complete major industrial operation in connection with the performance of this contract.

(f) The provisions of paragraph (e) of this clause shall not restrict the right of the Contractor to be reimbursed for the cost of insurance maintained by the Contractor in connection with the performance of this contract, other than insurance required in accordance with this clause: *Provided*, That such cost is allowable under the Allowable Cost and Payment clause of this contract.

(g) If any suit or action is filed or any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, and the risk of which is then uninsured or is insured for less than the amount claimed, the Contractor shall—

(1) Immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received;

(2) Authorize Government representatives to collaborate with counsel for the insurance carrier in settling or defending the claim when the amount of the liability claimed exceeds the amount of coverage; and

(3) Authorize Government representatives to settle or defend the claim and to represent the Contractor in or to take charge of any litigation, if required by the Government, when the liability is not insured or covered by bond. The Contractor may, at its own expense, be associated with the Government representatives in any such claim or litigation.

(End of clause)

*Alternate I (APR 1984).* If the solicitation includes the provision at 52.228-6, Insurance-Immunity from Tort Liability, and the successful offeror represents in the offer that the offeror is partially immune from tort liability as a State agency or as a charitable institution, add the following paragraph (h) to the basic clause:

(h) Notwithstanding paragraphs (a) and (c) of this clause—

(1) The Government does not assume any liability to third persons, nor will the Government reimburse the Contractor for its liability to third persons, with respect to loss due to death, bodily injury, or damage to property resulting in any way from the performance of this contract or any subcontract under this contract; and

(2) The contractor need not provide or maintain insurance coverage as required by paragraph (a) of this clause; *provided*, that the Contractor may obtain any insurance coverage deemed necessary, subject to approval by the Contracting Officer as to form, amount, and duration. The Contractor shall be reimbursed for the cost of such insurance and, to the extent provided in paragraph (c) of this clause, to liabilities to third persons for which the contractor has obtained insurance coverage as provided in this paragraph, but for which such coverage is insufficient in amount.

(End of clause)

*Alternate II* (APR 1984). If the solicitation includes the provision at 52.228-6, Insurance-Immunity from Tort Liability, and the successful offeror represents in the offer that the offeror is totally immune from tort liability as a State agency or as a charitable institution, substitute the following paragraphs (a) and (b) for paragraphs (a) through (g) of the basic clause:

(a) The Government does not assume any liability to third persons, nor will the Government reimburse the Contractor for its liability to third persons, with respect to loss due to death, bodily injury, or damage to property resulting in any way from the performance of this contract or any subcontract under this contract.

(b) If any suit or action is filed, or if any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, the Contractor shall immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received by the Contractor. The Contractor shall, if required by the Government, authorize Government representatives to settle or defend the claim and to represent the Contractor in or take charge of any litigation. The Contractor may, at its own expense, be associated with the Government representatives in any such claim or litigation.

(End of clause)

[56 FR 58316, Nov. 19, 1991]

**352.232-9 Withholding of contract payments.**

Insert the following clause in all solicitations and contracts other than purchase orders:

**WITHHOLDING OF CONTRACT PAYMENTS (APR 1984)**

Notwithstanding any other payment provisions of this contract, failure of the Contractor to submit required reports when due or failure to perform or deliver required work, supplies, or services, will result in the withholding of payments under this contract unless such failure arises out of causes beyond the control, and without the fault or negligence of the Contractor as defined by the clause entitled "Excusable Delays" or "Default", as applicable. The Government shall promptly notify the Contractor of its intention to withhold payment of any invoice or voucher submitted.

(End of clause)

**352.232-71 Cost sharing.**

The policy relative to cost sharing is set forth in 335.070.

(a) In contracts for which cost-sharing has been individually negotiated, the clause set forth in FAR 52.232-20 shall be used. Also, an article reading substantially as follows, which includes a cost-sharing formula agreed upon by the contracting officer and the contractor that provides for the ratio of cost-sharing for both the originally established estimated cost and any increase pursuant to the FAR clause, shall be included in the contract.

**COST SHARING (APR 1984)**

The Contractor agrees to share in the cost of the work hereunder to the extent of not less than (indicate percent of the total cost or dollar amount, etc.) and shall maintain records of all costs so contributed, as well as costs to be paid by the Government. Such records shall be subject to audit. Costs contributed by the Contractor shall not be charged to the Government under any other grant or contract (including allocation to other grants or contracts as part of an independent research and development program).

(End of clause)

(b) In contracts for which cost-sharing will be in accordance with a previously negotiated institutional agreement, the clause set forth in FAR 52.232-20 shall also be used. However, instead of specifying a cost-sharing formula, the following shall be included as a special provision.

**COST SHARING UNDER INSTITUTIONAL AGREEMENT (APR 1984)**

This contract is subject to an Institutional Cost-Sharing Agreement which became effective with respect to HHS research contracts on (date), and the Contractor agrees that the Government shall not bear the entire cost of the work hereunder.

(End of clause)

**352.232-73 Method of payment—letter of credit.**

When authorized by an individual or blanket determination, findings, and authorization for advance payment, under a letter of credit, the following clause shall be used: (See 332.406 for

further instructions regarding use of the clause.)

METHOD OF PAYMENT—LETTER OF CREDIT (APR 1984)

(a) The Contractor shall be paid with funds made available under the Federal Reserve Letter of Credit No. —, established by ——— Department of Health and Human Services, against which the Contractor will withdraw funds pursuant to Federal Reserve Letter of Credit procedures contained in Treasury Department Circular 1075 (31 CFR Part 205).

(b) At the request of the Contractor and subject to the following conditions, the Government shall make an advance payment, or advance payments, from time to time, to the Contractor. No advance payment shall be made: (1) Without the approval of the office administering advance payments (hereinafter called the "Administering Office" and designated in paragraph (g)(2)) as to the financial necessity therefor (except in the case of educational institutions); (2) in an amount which, together with all advance payments made, exceeds the contract amount; and (3) without a properly certified invoice. The Contractor shall (1) initiate cash drawdowns only when actually needed for its disbursements, (2) report timely the cash disbursements and balances as required by the Administering Office, and (3) impose the same standards of timing and amount upon any subcontractors including the furnishing of reports of cash disbursements and balances. Failure to adhere to these material provisions will be considered an event under paragraph (f) of this clause.

(c) The funds drawn by the Contractor against the Federal Reserve Letter of Credit shall be only for current allowable expenditures necessary for the performance of this contract.

(d) When requested in writing by the Contracting Officer, the Contractor shall repay to the Government such part of the unliquidated balance of the advance payments as shall, in the opinion of the Contracting Officer, be in excess of the Contractor's current needs or in excess of the contract price.

(e) If, upon completion or termination of this contract, all amounts obtained by the Contractor under this letter of credit have not been fully liquidated by authorized charges under the contract, the balance thereof shall be deducted from any sums otherwise due to the Contractor from the Government, and any excess funds shall be repaid by the Contractor to the Government upon demand.

(f) Upon the happening of any of the following events of default: (1) A finding by the Administering Office that the Contractor (i) has failed to observe any of the covenants, conditions, or warranties of these provisions

or has failed to comply with any material provisions of this contract, or (ii) has so failed to make progress, or is in such unsatisfactory financial condition, as to endanger performance of this contract, or (iii) has allocated inventory to this contract substantially exceeding reasonable requirements, or (iv) is delinquent in payment of taxes or of the costs of performance of this contract in the ordinary course of business; (2) appointment of a trustee, receiver or liquidator for all or a substantial part of the Contractor's property, or institution of bankruptcy, reorganization, arrangement or liquidation proceedings by or against the Contractor; (3) service of any writ of attachment, levy of execution, or commencement of garnishment proceedings; or (4) the commission of an act of bankruptcy; the Government, without limiting any rights it may otherwise have, may, in its discretion and upon written notice to the Contractor, withhold further withdrawals under the Letter of Credit and withhold further payments on this contract. Payment can also be stopped for lack of submission of timely and accurate reports in accordance with contract requirements. Upon the continuance of any such events of default for a period of thirty (30) days after such written notice to the Contractor, the Government may, in its discretion, and without limiting any other rights which the Government may have, take the following additional actions as it may deem appropriate in the circumstances:

(1) Charge interest on advance payments outstanding during the period of any such default at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41, 80 Stat. 97 for the Renegotiation Board;

(2) Demand immediate repayment of the unliquidated balance of advance payments hereunder; and/or

(3) Take possession of and, with or without advertisement, sell at public sale at which the Government may be purchaser, or at a private sale, all or any part of the property on which the Government has a lien under this contract, and after deducting any expenses incident to such sale, apply the net proceeds of such sale in reduction of the unliquidated balance of advance payments hereunder and in reduction of any other claims of the Government against the Contractor.

(g)(1) No interest shall be charged for advance payments made hereunder, except interest during a period of default as provided in paragraph (f)(2). The Contractor shall charge interest at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 85 Stat. 97 for the Renegotiation Board on subadvances or downpayments to subcontractors and such interest will be credited to the account of the Government. However, interest need not be charged on

subadvances on subcontracts with educational or research institutions provided such subcontracts are awarded without profit or fee for research, development or experimental work.

(2) The office administering advance payments is designated as \_\_\_\_\_.

(End of clause)

**352.232-74 Estimated cost and fixed fee—incrementally funded contract.**

The following clause, or one reading substantially as it, shall be included in the Special Provisions of an incrementally funded contract:

CONSIDERATION—ESTIMATED COST AND FIXED FEE (APR 1984)

(a) It is estimated that the total cost to the Government for full performance of this contract will be \$\_\_\_\_\_, of which the sum of \$\_\_\_\_\_ represents the estimated reimbursable costs and \$\_\_\_\_\_ represents the fixed-fee.

(b) Total funds currently available for payment and allotted to this contract are \$\_\_\_\_\_, of which \$\_\_\_\_\_ represents the estimated reimbursable costs and \$\_\_\_\_\_ represents the fixed-fee. For further provisions on funding, see the Limitation of Funds clause.

(c) It is estimated that the amount currently allotted will cover performance of Phase I which is scheduled to be completed by (date) \_\_\_\_\_.

(d) The Contracting Officer may allot additional funds to the contract without the concurrence of the Contractor.

(End of clause)

**352.232-75 Incremental funding.**

The following provision shall be included in all requests for proposals whenever the use of incremental funding is contemplated:

INCREMENTAL FUNDING (APR 1984)

(a) Sufficient funds are not presently available to cover the total cost of the complete multiple year project described in this solicitation. However, it is the Government's intention to negotiate and award a contract using the incremental funding concepts described in the clause entitled Limitation of Funds. Under that clause, which will be included in the resultant contract, initial funds will be obligated under the contract to cover the first year of performance. Additional funds are intended to be allotted to the contract by contract modification, up to and including the full estimated cost of the contract, to accomplish the entire project. While it is the Government's intention to

progressively fund this contract over the entire period of performance up to and including the full estimated cost, the Government will not be obligated to reimburse the Contractor for costs incurred in excess of the periodic allotments, nor will the Contractor be obligated to perform in excess of the amount allotted.

(b) The Limitation of Funds clause to be included in the resultant contract shall supersede the Limitation of Cost clause found in the General Provisions.

(End of provision)

**352.233-70 Litigation and claims.**

Insert the following clause in all solicitations and resultant cost-reimbursement contracts:

LITIGATION AND CLAIMS (APR 1984)

The Contractor shall give the Contracting Officer immediate notice in writing of (a) any action, including any proceeding before an administrative agency, filed against the Contractor arising out of the performance of this contract, including, but not limited to the performance of any subcontract hereunder; and (b) any claim against the Contractor the cost and expense of which is allowable under the clause entitled "Allowable Cost and Payment." Except as otherwise directed by the Contracting Officer, the Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor with respect to such action or claim. To the extent not in conflict with any applicable policy of insurance, the Contractor may, with the Contracting Officer's approval, settle any such action or claim. If required by the Contracting Officer, the Contractor shall (a) effect an assignment and subrogation in favor of the Government of all the Contractor's rights and claims (except those against the Government) arising out of any such action or claim against the Contractors; and (b) authorize representatives of the Government to settle or defend any such action or claim and to represent the Contractor in, or to take charge of, any action. If the settlement or defense of an action or claim is undertaken by the Government, the Contractor shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action against the Contractor is not covered by a policy of insurance, the Contractor shall, with the approval of the Contracting Officer, proceed with the defense of the action in good faith. The Government shall not be liable for the expense of defending any action or for any costs resulting from the loss thereof to the extent that the Contractor would have been compensated by insurance which was required by law or regulation or

### 352.237-70

by written direction of the Contracting Officer, but which the Contractor failed to secure through its own fault or negligence.

In any event, unless otherwise expressly provided in this contract, the Contractor shall not be reimbursed or indemnified by the Government for any liability loss, cost or expense, which the Contractor may incur or be subject to by reason of any loss, injury, or damage, to the person or to real or personal property of any third parties as may accrue during, or arise from, the performance of this contract.

(End of clause)

### 352.237-70 Consulting services reporting.

The contracting officer shall include the following clause in every contract for consulting services, as defined in the General Administration Manual Chapter 8-15 and as required by 337.270.

#### CONSULTING SERVICES REPORTING (APR 1984)

The Contractor shall set forth on the cover of every report submitted pursuant to this contract the following information: (a) Name and business address of the Contractor; (b) Contract number; (c) Contract dollar amount; (d) Whether the contract was competitively or noncompetitively awarded; (e) Name of the Department's project officer and complete office identification and address; and (f) Names of the managerial and professional personnel responsible for the content and preparation of the report.

(End of clause)

### 352.242-71 Final decisions on audit findings.

Insert the following clause in all solicitations and resultant cost-reimbursement contracts.

#### FINAL DECISIONS ON AUDIT FINDINGS (APR 1984)

For the purpose of issuing final decisions under the Disputes clause of this contract concerning monetary audit findings, the Contracting Officer shall be that person with ultimate responsibility for making that decision in accordance with Chapter 1-105, Resolution of Audit Findings, of the Department's Grants Administration Manual.

(End of clause)

### 352.242-72—352.242-79 [Reserved]

### 352.249-14 Excusable delays.

Insert the following clause in all solicitations and resultant contracts other than purchase orders which do

### 48 CFR Ch. 3 (10-1-97 Edition)

not have either a default or excusable delays clause.

#### EXCUSABLE DELAYS (APR 1984)

(a) Except with respect to failures of subcontractors, the Contractor shall not be considered to have failed in performance of this contract if such failure arises out of causes beyond the control and without the fault or negligence of the Contractor.

(b) Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the failure of a subcontractor to perform, and if such failure arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be deemed to have failed in performance of the contract, unless: (1) The supplies or services to be furnished by the subcontractor were obtainable from other sources, (2) The Contracting Officer shall have ordered the Contractor in writing to procure such supplies or services from such other sources, and (3) The Contractor shall have failed to comply reasonably with such order. Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of such failure and, if he/she shall determine that any failure to perform was occasioned by any one or more of the said causes, the delivery schedule shall be revised accordingly, subject to the rights of the Government under the termination clause hereof. (As used in this clause, the terms "subcontractor" and "subcontractors" mean subcontractor(s) at any tier.)

(End of clause)

### 352.270-1 Accessibility of meetings, conferences, and seminars to persons with disabilities.

The following clause is to be used in accordance with 370.102:

#### ACCESSIBILITY OF MEETINGS, CONFERENCES, AND SEMINARS TO PERSONS WITH DISABILITIES (APR 1984)

The Contractor agrees as follows:

(a) *Planning.* The Contractor will develop a plan to assure that any meeting, conference, or seminar held pursuant to this contract will meet or exceed the minimum accessibility standards set forth below. This plan shall include a provision for ascertaining the number and types of disabled individuals planning to attend the meeting, conference, or

seminar. The plan shall be submitted to the project officer for approval prior to initiating action. (A consolidated or master plan for contracts requiring numerous meetings, conferences, or seminars may be submitted in lieu of separate plans.)

(b) *Facilities.* Any facility to be utilized for meetings, conferences, or seminars in performance of this contract shall be accessible to persons with disabilities. The Contractor shall determine, by an on-site inspection if necessary, that the following minimum accessibility requirements are met, or suitable modifications are made to meet these requirements, before the meeting:

(1) *Parking.* (i) Where parking is available on or adjacent to the site, one 12' wide space must be set aside for the care of each mobility impaired attendee. The space need not be permanently striped but may be temporarily marked by signs, ropes, or other means satisfactory to carry out this provision.

(ii) Where parking is not available on or adjacent to the site, valet parking or other alternative means to assist a person who has a mobility impairment may be used. Alternate means must be satisfactory in the judgment of the Government project officer.

(2) *Entrances.* (i) "Entrances" shall include at least one accessible entrance from the street/sidewalk level, and at least one accessible entrance from any available parking facility.

(ii) The entrance shall be level or accessible by ramp with an incline that allows independent negotiation by a person in a wheelchair. In general, the slope of the incline shall be no more than 1" rise per foot of ramp length (1:12).

(iii) Entrance doorways shall be at least 30" in clear width and capable of operation by persons with disabilities. Revolving doors, regardless of foldback capability, will not meet this requirement.

(3) *Meeting Rooms.* (i) Meeting room access from the main entrance area must be level or at an independently negotiable incline (approximately 1:12) and/or served by elevators from the main entrance level. All elevators shall be capable of accommodating a wheelchair 29" wide by 45" long.

(ii) Meeting rooms shall be on one level or, if on different levels, capable of being reached by elevators or by ramps that can be independently negotiated by a person in a wheelchair. Doorways to all meeting rooms shall be at least 30" in clear width.

(iii) The interior of the meeting room shall be on one level or ramped so as to be independently negotiable for a person in a wheelchair.

(iv) Stages, speaker platforms, etc. which are to be used by persons in wheelchairs must be accessible by ramps or lifts. When used, the ramps may not necessarily be independently negotiable if space does not permit. However, any slope over 1:12 must be ap-

proved by the project officer. Each case is to be judged on its own merits.

(v) If a meeting room with fixed seating is utilized, seating arrangements for persons in wheelchairs shall be made so that these persons are incorporated into the group rather than isolated on the perimeter of the group.

(4) *Restrooms.* (i) Restrooms shall have level access, signs indicating accessibility, and doorways at least 30" in clear width.

(ii) Sufficient turning space within restrooms shall be provided for independent use by a person in a wheelchair 29" wide by 45" long. A space 60" by 60" or 63" by 56" of unobstructed floor space as measured 12" above the floor is acceptable by standard; other layouts will be accepted if it can be demonstrated that they are usable as indicated.

(iii) There will be a restroom for each sex or a unisex restroom with at least one toilet stall capable of accommodating a wheelchair 29" wide by 45" long (by standard, the minimum is 3'-0" by 4'-8") with outswinging doors or privacy curtains. Wall mounted grab bars are required.

(iv) When separate restrooms have been set up for mobility impaired persons, they shall be located adjacent to the regular restrooms and shall be fully accessible.

(5) *Eating Facilities.* (i) Eating facilities in the meeting facility must be accessible under the same general guidelines as are applied to meeting rooms.

(ii) If the eating facility is a cafeteria, the food service area (cafeteria line) must allow sufficient room for independent wheelchair movement and accessibility to food for persons in wheelchairs, and cafeteria staff shall be available to assist disabled persons.

(6) *Overnight Facilities.* If overnight accommodations are required:

(i) Sufficient accessible guest rooms to accommodate each attendee who is disabled shall be located in the facility where the meeting, conference, or seminar is held, or in a facility housing the attendees which is conveniently located nearby, whichever is satisfactory to the project officer.

(ii) Overnight facilities shall provide for the same minimum accessibility requirements as the facility utilized for the meeting, conference, or seminar. In addition, guest room access from the main entrance area shall be level, ramped at an independently negotiable incline (1:12), and/or served by elevators capable of accommodating a wheelchair 29" wide by 45" long.

(iii) Doorways to guest rooms, including the doorway to the bathroom, shall be at least 30" in clear width.

(iv) Bathrooms shall have wall mounted grab bars at the tub and water closet.

(v) Guest rooms for persons with a disability shall be provided at the same rate as a guest room for other attendees.

(7) *Water Fountains.* Water fountains shall be accessible to disabled persons, or have cup dispensers for use by persons in wheelchairs.

(c) *Provisions of Services for Sensory Impaired Attendees.* (1) The Contractor, in planning the meeting, conference, or seminar, shall include in all announcements and other materials pertaining to the meeting, conference, or seminar a notice indicating that services will be made available to sensory impaired persons attending the meeting, if requested within five (5) days of the date of the meeting, conference, or seminar. The announcement(s) and other material(s) shall indicate that sensory impaired persons may contact a specific person(s), at a specific address and phone number(s), to make their service requirements known. The phone number(s) shall include a teletype number for the hearing impaired.

(2) The Contractor shall provide, at no cost to the individual, those services required by persons with sensory impairments to insure their complete participation in the meeting, conference, or seminar.

(3) As a minimum, when requested in advance, the Contractor shall provide the following services:

(i) For hearing impaired persons, qualified interpreters. Provisions will also be made for volume controlled phone lines and, if necessary, transportation to local teletype equipment to enable hearing impaired individuals to receive and send meeting related calls. If local teletype equipment is not available, the Contractor shall provide on site teletype equipment. Also, the meeting rooms will be adequately illuminated so signing by interpreters can be easily seen.

(ii) For vision impaired persons, readers and/or cassette materials, as necessary, to enable full participation. Also, meeting rooms will be adequately illuminated.

(iii) Agenda and other conference material(s) shall be translated into a usable form for the visually and hearing impaired. Readers, braille translations, and/or tape recordings are all acceptable. These materials shall be available to sensory impaired individuals upon their arrival.

(4) The Contractor is responsible for making every effort to ascertain the number of sensory impaired individuals who plan to attend the meeting, conference, or seminar. However, if it can be determined that there will be no sensory impaired person (deaf and/or blind) in attendance, the provision of those services under paragraph (c) for the nonrepresented group, or groups, is not required.

(End of clause)

### 352.270-2 Indian preference.

The following clause shall be used as prescribed in 370.202(a):

#### INDIAN PREFERENCE (APR 1984)

(a) The Contractor agrees to give preference in employment opportunities under this contract to Indians who can perform required work, regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation. To the extent feasible and consistent with the efficient performance of this contract, the Contractor further agrees to give preference in employment and training opportunities under this contract to Indians who are not fully qualified to perform regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation. The Contractor also agrees to give preference to Indian organizations and Indian-owned economic enterprises in the awarding of any subcontracts to the extent feasible and consistent with the efficient performance of this contract. The Contractor shall maintain statistical records as are necessary to indicate compliance with this paragraph.

(b) In connection with the Indian employment preference requirements of this clause, the Contractor shall provide opportunities for training incident to such employment. Such training shall include on-the-job, classroom or apprenticeship training which is designed to increase the vocational effectiveness of an Indian employee.

(c) If the Contractor is unable to fill its employment and training opportunities after giving full consideration to Indians as required by this clause, those needs may be satisfied by selection of persons other than Indians in accordance with the clause of this contract entitled "Equal Opportunity."

(d) If no Indian organizations or Indian-owned economic enterprises are available under reasonable terms and conditions, including price, for awarding of subcontracts in connection with the work performed under this contract, the Contractor agrees to comply with the provisions of this contract involving utilization of small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, or labor surplus area concerns.

(e) As used in this clause:

(1) "Indian" means a person who is a member of an Indian Tribe. If the contractor has reason to doubt that a person seeking employment preference is an Indian, the Contractor shall grant the preference but shall require the individual to provide evidence within thirty (30) days from the Tribe concerned that the person is a member of that Tribe.

(2) "Indian Tribe" means an Indian Tribe, pueblo, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85

Stat. 688; 43 U.S.C. 1601) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(3) "Indian organization" means the governing body of any Indian Tribe or entity established or recognized by such governing body in accordance with the Indian Financing Act of 1974 (88 Stat. 77; 25 U.S.C. 1451); and

(4) "Indian-owned economic enterprise" means any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, provided that such Indian ownership shall constitute not less than 51 percent of the enterprise, and that ownership shall encompass active *operation and control* of the enterprise.

(f) The Contractor agrees to include the provisions of this clause, including this paragraph (f), in each subcontract awarded at any tier under this contract.

(g) In the event of noncompliance with this clause, the Contracting Officer may terminate the contract in whole or in part or may impose any other sanctions authorized by law or by other provisions of the contract.

(End of clause)

### 352.270-3 Indian preference program.

The following clause shall be used as prescribed in 370.202(b):

#### INDIAN PREFERENCE PROGRAM (APR 1984)

(a) In addition to the requirements of the clause of this contract entitled "Indian Preference," the Contractor agrees to establish and conduct an Indian preference program which will expand opportunities for Indians to receive preference for employment and training in connection with the work to be performed under this contract, and which will expand the opportunities for Indian organizations and Indian-owned economic enterprises to receive a preference in the awarding of subcontracts. In this connection, the Contractor shall:

(1) Designate a liaison officer who will (i) Maintain liaison with the Government and the Tribe(s) on Indian preference matters; (ii) Supervise compliance with the provisions of this clause; and (iii) Administer the Contractor's Indian preference program.

(2) Advise its recruitment sources in writing and include a statement in all advertisements for employment that Indian applicants will be given preference in employment and training incident to such employment.

(3) Not more than twenty (20) calendar days after award of the contract, post a written notice in the Tribal office of any reservations on which or near where the work under this contract is to be performed that sets forth the Contractor's employment needs

and related training opportunities. The notice shall include the approximate numbers and types of employees needed; the approximate dates of employment; the experience or special skills required for employment, if any; training opportunities available; and other pertinent information necessary to advise prospective employees of any other employment requirements. The Contractor shall also request the Tribe(s) on or near whose reservation(s) the work is to be performed to provide assistance to the Contractor in filling its employment needs and training opportunities. The Contracting Officer will advise the Contractor of the name, location, and phone number of the Tribal officials to contact in regard to the posting of notices and requests for Tribal assistance.

(4) Establish and conduct a subcontracting program which gives preference to Indian organizations and Indian-owned economic enterprises as subcontractors and suppliers under this contract. The Contractor shall give public notice of existing subcontracting opportunities and, to the extent feasible and consistent with the efficient performance of this contract, shall solicit bids or proposals only from Indian organizations or Indian-owned economic enterprises. The Contractor shall request assistance and information on Indian firms qualified as suppliers or subcontractors from the Tribe(s) on or near whose reservation(s) the work under the contract is to be performed. The Contracting Officer will advise the contractor of the name, location, and phone number of the Tribal officials to be contacted in regard to the request for assistance and information. Public notices and solicitations for existing subcontracting opportunities shall provide an equitable opportunity for Indian firms to submit bids or proposals by including:

(i) A clear description of the supplies or services required, including quantities, specifications, and delivery schedules which facilitate the participation of Indian firms; (ii) A statement indicating that preference will be given to Indian organizations and Indian-owned economic enterprises in accordance with section 7(b) of Public Law 93-638 (88 Stat. 2205; 25 U.S.C. 450e(b)); (iii) Definitions for the terms "Indian organization" and "Indian-owned economic enterprise" as prescribed under the "Indian Preference" clause of this contract; (iv) A representation to be completed by the bidder or offeror that it is an Indian organization or "Indian-owned economic enterprise; and (v) A closing date for receipt of bids or proposals which provides sufficient time for preparation and submission of a bid or proposal. If after soliciting bids or proposals from Indian organizations and Indian-owned economic enterprises, no responsive bid or acceptable proposal is received, the Contractor shall comply with the requirements of paragraph (d) of the "Indian Preference" clause of this

contract. If one or more responsive bids or acceptable proposals are received, award shall be made to the low responsible bidder or acceptable offeror if the price is determined to be reasonable. If the low responsive bid or acceptable proposal is determined to be unreasonable as to price, the Contractor shall attempt to negotiate a reasonable price and award a subcontract. If a reasonable price cannot be agreed upon, the Contractor shall comply with the requirements of paragraph (d) of the "Indian Preference" clause of this contract. (5) Maintain written records under this contract which indicate: (i) The numbers of Indians seeking employment for each employment position available under this contract; (ii) the number and types of positions filled by Indians and non-Indians, and the total number of Indians employed under this contract; (iii) For those positions where there are both Indian and non-Indian applicants, and a non-Indian is selected for employment, the reason(s) why the Indian applicant was not selected; (iv) Actions taken to give preference to Indian organizations and Indian-owned economic enterprises for subcontracting opportunities which exist under this contract; (v) Reasons why preference was not given to Indian firms as subcontractors or suppliers for each requirement where it was determined by the Contractor that such preference would not be consistent with the efficient performance of the contract; and (vi) The number of Indian organizations and Indian-owned economic enterprises contacted, and the number receiving subcontract awards under this contract.

(6) Submit to the Contracting Officer for approval a quarterly report which summarizes the Contractor's Indian preference program and indicates the number and types of available positions filled by Indians and non-Indians, and the dollar amounts of all subcontracts awarded to Indian organizations and Indian-owned economic enterprises, and to all other firms.

(7) Maintain records pursuant to this clause and keep them available for review by the Government until expiration of one (1) year after final payment under this contract, or for such longer period as may be required by any other clause of this contract or by applicable law or regulation.

(b) For purposes of this clause, the following definitions of terms shall apply:

(1) The terms "Indian," "Indian Tribe," "Indian Organization," and "Indian-owned economic enterprise" are defined in the clause of this contract entitled "Indian Preference."

(2) "Indian reservation" includes Indian reservations, public domain Indian Allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the

Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601 et seq.)

(3) "On or near an Indian Reservation" means on a reservation or reservations or within that area surrounding an Indian reservation(s) where a person seeking employment could reasonably be expected to commute to and from in the course of a workday.

(c) Nothing in the requirements of this clause shall be interpreted to preclude Indian Tribes from independently developing and enforcing their own Indian preference requirements. Such requirements must not conflict with any Federal statutory or regulatory requirement dealing with the award and administration of contracts.

(d) The Contractor agrees to include the provisions of this clause, including this paragraph (d), in each subcontract awarded at any tier under this contract and to notify the Contracting Officer of such subcontracts.

(e) In the event of noncompliance with this clause, the Contracting Officer may terminate the contract in whole or in part or may impose any other sanctions authorized by law or by other provisions of the contract.

(End of clause)

### 352.270-4 Pricing of adjustments.

Insert the following clause in all solicitations and resultant fixed-priced contracts other than purchase orders.

#### PRICING OF ADJUSTMENTS (APR 1984)

When costs are a factor in determination of a contract price adjustment pursuant to the "Changes" clause or any provision of this contract, such costs shall be determined in accordance with the applicable cost principles and procedures set forth below:

Principles	Types of organizations
(a) Subpart 31.2 of the Federal Acquisition Regulation.	Commercial.
(b) Subpart 31.3 of the Federal Acquisition Regulation.	Education.
(c) Subpart 31.6 of the Federal Acquisition Regulation.	State or local governments.
(d) 45 CFR Part 74 Appendix E .....	Hospitals.
(e) Subpart 31.7 of the Federal Acquisition Regulation.	Other non-profit institutions.

(End of clause)

[49 FR 14031, Apr. 9, 1984, as amended at 50 FR 38005, Sept. 19, 1985]

### 352.270-5 Key personnel.

Insert the following clause in all solicitations and resultant cost-reimbursement contracts.

## KEY PERSONNEL (APR 1984)

The personnel specified in this contract are considered to be essential to the work being performed hereunder. Prior to diverting any of the specified individuals to other programs, the Contractor shall notify the Contracting Officer reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the program. No diversion shall be made by the Contractor without the written consent of the Contracting Officer; *Provided*, that the Contracting Officer may ratify in writing such diversion and such ratification shall constitute the consent of the Contracting Officer required by the clause. The contract may be amended from time to time during the course of the contract to either add or delete personnel, as appropriate.

(End of clause)

**352.270-6 Publication and publicity.**

Insert the following clause in all solicitations and resultant contracts.

## PUBLICATIONS AND PUBLICITY (JUL 1991)

(a) Unless otherwise specified in this contract, the Contractor is encouraged to publish the results of its work under this contract. A copy of each article submitted by the Contractor for publication shall be promptly sent to the Project Officer. The Contractor shall also inform the Project Officer when the article or other publication is published, and furnish a copy of it as finally published.

(b) The Contractor shall include in any publication resulting from work performed under this contract a disclaimer reading as follows:

The content of this publication does not necessarily reflect the views or policies of the Department of Health and Human Services, nor does mention of trade names, commercial products, or organizations imply endorsement by the U.S. Government.

(End of Clause)

[56 FR 33882, July 24, 1991, as amended at 56 FR 57602, Nov. 13, 1991]

**352.270-7 Paperwork Reduction Act.**

Insert the following clause in all solicitations and contracts.

## PAPERWORK REDUCTION ACT (APR 1984)

(a) In the event that it subsequently becomes a contractual requirement to collect or record information calling either for answers to identical questions from 10 or more persons other than Federal employees, or information from Federal employees which is outside the scope of their employment, for use by the Federal government or disclosure to third parties, the Paperwork Reduction Act of 1980 (Pub. L. 96-511) shall apply to this contract. No plan, questionnaire, interview guide or other similar device for collecting information (whether repetitive or single-time) may be used without first obtaining clearance from the Assistant Secretary for Management and Budget (ASMB) within the Department of Health and Human Services (HHS) and the Office of Management and Budget (OMB). Contractors and Project Officers should be guided by the provisions of 5 CFR Part 1320, Controlling Paperwork Burdens on the Public, and seek the advice of the HHS operating division or Office of the Secretary Reports Clearance Officer to determine the procedures for acquiring ASMB and OMB clearance.

(b) The Contractor shall obtain the required ASMB and OMB clearance through the Project Officer before expending any funds or making public contacts for the collection of data. The authority to expend funds and proceed with the collection of information shall be in writing by the Contracting Officer. The Contractor must plan at least 120 days for ASMB and OMB clearance. Excessive delay caused by the Government which arises out of causes beyond the control and without the fault or negligence of the Contractor will be considered in accordance with the Excusable Delays or Default clause of this contract.

(End of clause)

**PART 353—FORMS****Subpart 353.3—Illustrations of Forms**

Sec.

353.370-393 Form HHS 393, Purchase/Service/Stock Requisition.

353.370-674 Form HHS 674, Structured Approach Profit/Fee Objective.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

**Subpart 353.3—Illustrations of Forms**

353.370-393

48 CFR Ch. 3 (10-1-97 Edition)

**353.370-393 Form HHS 393, Purchase/Service/Stock Requisition.**

DEPARTMENT OF HEALTH AND HUMAN SERVICES PURCHASE/SERVICE/STOCK REQUISITION		REQUISITION NUMBER <b>511163</b>			
BPA and Call No. _____		OFFICE CODE/SYMBOL _____			
TO _____	REQUEST FOR <input type="checkbox"/> PURCHASE <input type="checkbox"/> SERVICE <input type="checkbox"/> STOCK ISSUE <input type="checkbox"/> RENTAL/LEASE				
REQUESTING ORGANIZATION _____	CUSTODIAL AREA _____	DATE _____	OBJECT CLASS _____		
FOR REFERENCE CALL _____	EXTENSION _____	APPROPRIATION _____			
DELIVER TO _____	CAN _____		DATE REQUIRED _____		
ITEM NO.	DESCRIPTION (INCLUDE STOCK NUMBER, MODEL/PART NO., ETC.)	QUANTITY REQUIRED	UNIT OF ISSUE	COST	
				UNIT	TOTAL
I certify that the property/services requested are required for Government business, and are not available from excess or current assets.*		FUNDS AVAILABLE (Signature/Title) _____	DATE _____	TOTAL	
REQUESTED BY (Signature/Title)* _____	DATE _____	RECEIVING OFFICIAL - I certify that the quantities indicated in the "Quantity Required" column above have been received in total or as annotated.			
RECOMMEND APPROVAL (Signature/Title)* _____	DATE _____	RECEIVING OFFICIAL (Signature/Title) _____		DATE _____	
APPROVED BY (Signature/Title)* _____	DATE _____	ORDER NO. (PO, DO, FEDSTRIP, ETC.) _____		ORDER DATE _____	
PROPERTY MANAGEMENT OFFICER (Signature)* _____	DATE _____	VOUCHER NO. _____		VOUCHER DATE _____	

HHS - 393 (Rev. 4/81)

[51 FR 44295, Dec. 9, 1986]

## 353.370-674 Form HHS 674, Structured Approach Profit/Fee Objective.

Structured Approach Profit/Fee Objective				
CONTRACTOR			RFP/CONTRACT NO.	
BUSINESS UNIT			CONTRACT TYPE	
ADDRESS				
CONTRACTOR EFFORT				
1. COST CATEGORY	GOVERNMENT'S COST OBJECTIVE (a)	WEIGHT RANGE (b)	ASSIGNED WEIGHT (c)	WEIGHTED PROFIT/FEE ((a) x (c)) (d)
MATERIAL ACQUISITION		1% to 5%		
DIRECT LABOR		4% to 15%		
OVERHEAD		4% to 9%		
OTHER COSTS		1% to 5%		
GENERAL MANAGEMENT (G & A)		4% to 8%		
1. A TOTAL				
2 OTHER FACTORS				
FACTOR	MEASUREMENT BASE (a)	WEIGHT RANGE (b)	ASSIGNED WEIGHT (c)	WEIGHTED PROFIT/FEE 1. A (a) x (c) (d)
COST RISK	TOTAL COST OBJECTIVE 1. A (a)	0% TO 7%		
INVESTMENT		-2% TO +2%		
PERFORMANCE		-1% TO +1%		
SOCIO ECONOMIC PROGRAMS		-5% TO +5%		
SPECIAL SITUATIONS				
2 A TOTAL OTHER FACTORS				
3 SUBTOTAL PROFIT/FEE LINES (1. A) + (2. A)				
4 LESS FACILITIES CAPITAL COST OF MONEY				
5 TOTAL PROFIT/FEE OBJECTIVE LINE (3) - (4)				

FORM HHS-674 (12/81)

[49 FR 14047, Apr. 9, 1984]

## SUBCHAPTER T—HHS SUPPLEMENTATIONS

### PART 370—SPECIAL PROGRAMS AFFECTING ACQUISITION

#### Subpart 370.1—Accessibility of Meetings, Conferences, and Seminars to Persons With Disabilities

Sec.

370.101 Policy.

370.102 Responsibilities.

#### Subpart 370.2—Indian Preference in Em- ployment, Training, and Subcontract- ing Opportunities

370.201 Statutory requirements.

370.202 Applicability.

370.203 Definitions.

370.204 Compliance enforcement.

370.205 Tribal preference requirements.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 14048, Apr. 9, 1984, unless otherwise noted.

#### Subpart 370.1—Accessibility of Meetings, Conferences, and Seminars to Persons With Dis- abilities

##### 370.101 Policy.

(a) It is the policy of HHS that all meetings, conferences, and seminars be accessible to individuals with disabilities. For the purposes of this policy, accessibility is defined as both physical access to meeting, conference, and seminar sites, and aids and services to enable individuals with sensory disabilities to fully participate in meetings, conferences, and seminars.

(b) In regard to acquisition, the policy is applicable to all contracts where the statement of work requires the contractor to conduct meetings, conferences, or seminars that are open to the public or involve HHS personnel, but not to ad hoc meetings that may be necessary or incidental to contract performance.

##### 370.102 Responsibilities.

(a) The contracting officer shall include the clause in 352.270-1 in every solicitation and resulting contract when the statement of work requires the contractor to conduct meetings,

conferences, or seminars in accordance with 370.101(b).

(b) The project officer shall be responsible for obtaining, reviewing, and approving the contractor's plan, which is to be submitted in response to paragraph (a) of the contract clause in 352.270-1. A consolidated or master plan for contracts requiring numerous meetings, conferences, or seminars will be acceptable. The project officer, prior to approving the plan, shall consult with the Office of Engineering Services serving the region where the meeting, conference, or seminar is to be held, to assure that the contractor's plan meets the accessibility requirements of the contract clause. The Office of Engineering Services shall make a determination on the adequacy of the contractor's plan, and notify the project officer, in writing, within ten (10) working days of receiving the request from the project officer.

[49 FR 14048, Apr. 9, 1984, as amended at 50 FR 23135, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

#### Subpart 370.2—Indian Preference in Employment, Training, and Subcontracting Opportunities

##### 370.201 Statutory requirements.

Section 7(b) of the Indian Self-Determination and Education Assistance Act, Public Law 93-638, 88 Stat. 2205; 25 U.S.C. 450e(b) requires:

Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible—

(1) Preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) Preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77).

**370.202 Applicability.**

The Indian Preference clause set forth in 352.270-2 and the Indian Preference Program clause set forth in 352.270-3 have been developed to implement section 7(b) of Public Law 93-638 for all activities of the Department. The clauses shall be used by any affected departmental contracting activity as follows, except solicitations issued and contracts awarded pursuant to Title I of Public Law 93-638 (25 U.S.C. 450 et seq.) are exempted:

(a) The Indian Preference clause (352.270-2) shall be included in each solicitation and resultant contract, regardless of dollar amount:

(1) When the contract is to be awarded pursuant to an act specifically authorizing contracts with Indian organizations; or

(2) Where the work to be performed under the contract is specifically for the benefit of Indians and is in addition to any incidental benefits which might otherwise accrue to the general public.

(b) The Indian Preference Program clause (352.270-3) shall be included in each solicitation and resultant contract when:

(1) The dollar amount of the acquisition is expected to equal or exceed \$50,000 for nonconstruction work or \$100,000 for construction work;

(2) The Indian Preference clause is to be included in the solicitation and resultant contract; and

(3) The determination is made, prior to solicitation that the work to be performed under the resultant contract will take place in whole or in substantial part on or near an Indian reservation(s). In addition, the Indian Preference Program clause may be included in any solicitation and resultant contract below the \$50,000 or \$100,000 level for nonconstruction or construction contracts, respectively, but which meet the requirements of paragraphs (b) (2) and (3) of this section, and, in the opinion of the contracting activity, offer substantial opportunities for Indian employment, training, and sub-contracting.

**370.203 Definitions.**

For purposes of this Subpart 370.2, the following definitions shall apply:

(a) *Indian* means a person who is a member of an Indian Tribe. If the contractor has reason to doubt that a person seeking employment preference is an Indian, the contractor shall grant the preference but shall require the individual to provide evidence within thirty (30) days from the Tribe concerned that the person is a member of that Tribe.

(b) *Indian Tribe* means an Indian Tribe, pueblo, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(c) *Indian organization* means the governing body of any Indian Tribe or entity established or recognized by such governing body in accordance with the Indian Financing Act of 1974 (88 Stat. 77; 25 U.S.C. 1451).

(d) *Indian-owned economic enterprise* means any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, provided that such Indian ownership shall constitute not less than 51 percent of the enterprise, and that ownership shall encompass active *operation and control*.

(e) *Indian reservation* includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601 et seq.).

(f) *On or near an Indian Reservation* means on a reservation or reservations or within that area surrounding an Indian reservation(s) where a person seeking employment could reasonably be expected to commute to and from in the course of a work day.

**370.204 Compliance enforcement.**

(a) The concerned contracting activity shall be responsible for conducting periodic reviews to insure contractor compliance with the requirements of

the clauses set forth in 352.270–2 and 352.270–3. These reviews may be conducted with the assistance of the Indian Tribe(s) concerned.

(b) Complaints of noncompliance with the requirements of the clauses set forth in 352.270–2 and 352.270–3 which are filed in writing with the contracting activity shall be promptly investigated and resolved by the contracting officer.

**370.205 Tribal preference requirements.**

(a) Where the work under a contract is to be performed on an Indian reservation, the contracting activity may supplement the clause set forth in 352.270–3 by adding specific Indian preference requirements of the Tribe on whose reservation the work is to be performed. The supplemental requirements shall be jointly developed for the contract by the contracting activity and the Tribe. Supplemental preference requirements must represent a further implementation of the require-

ments of section 7(b) of Public Law 93–638 and must be approved by the affected program director and approved for legal sufficiency by the Business and Administrative Law Division, OGC, or a regional attorney before being added to a solicitation and resultant contract. Any supplemental preference requirements to be added to the clause in 352.270–3 shall be included in the solicitation and clearly identified in order to ensure uniform understanding of the additional requirements by all prospective bidders or offerors.

(b) Nothing in these regulations shall be interpreted to preclude Tribes from independently developing and enforcing their own tribal preference requirements. Such independently developed tribal preference requirements shall not, except as provided in paragraph (a) above, become a requirement in contracts covered under this Subpart 370.2, and must not conflict with any Federal statutory or regulatory requirement concerning the award and administration of contracts.

## ATTACHMENT I TO CHAPTER 3—SINGLE LETTER OF CREDIT RECIPIENTS AND CENTRAL POINT ADDRESSES

State	Organization and payee No.	Recipient CRS-EIN <sup>1</sup>	Letter of credit
Alabama	University of Alabama Medical Center, 1-636005396-A4	1-636001138-A2, 1-636001138-A3, 1-636001138-A4, 1-636001138-A5, 1-636001138-B1, 1-636005396-A3, 1-636005396-A4, 1-636005396-A5, 1-636005396-A6, 1-636005396-A7, 1-636005396-A8.	75080110
	University Station, Birmingham, Alabama 35296.		
	University of Alabama, 1-636001138-A1	1-636001138-A1, 1-636001138-A6	75080115
	Comptroller, University of Alabama, P.O. Box M, University, Alabama	1-636001138-A7, 1-636001138-A8, 1-636001138-A9, 1-636001138-B2, 1-636001138-B3, 1-636001138-B4.	
		1-630288868-A1, 1-630288868-A2	75083532
	Southern Research, Institute, 1-630288868-A2		
	Financial Officer, Southern Research Institute, 2000 9th Avenue, South, Birmingham, Alabama 35205.		
	State of Alaska, 1-900001517-A1	1-000700389-A1, 1-926001185-A2, 1-926001185-A3	75080021
	Director, Division of Finance, Department of Administration, Pouch C, Juneau, Alaska 99801.	1-926001185-A4, 1-926001185-A5, 1-926001185-A7, 1-926001185-B1, 1-926001185-B2, 1-926001185-B3, 1-926001185-B6, 1-926001185-B7, 1-926001185-B8, 1-926001185-B9, 1-926001185-C1, 1-926001185-C2.	
Arizona	State of Arizona, 1-866004791-B7	1-866004791-A1, 1-866004791-A2, 1-866004791-A3, 1-866004791-A4, 1-866004791-A5, 1-866004791-A6, 1-866004791-A7, 1-866004791-A8, 1-866004791-A9, 1-866004791-B2, 1-866004791-B3, 1-866004791-B7, 1-866004791-B8, 1-866004791-C2, 1-866004791-C5, 1-866004791-C7, 1-866004791-C8, 1-866004791-C9, 1-866004791-D1, 1-866004791-D2, 1-866004791-D3, 1-866004791-D5, 1-866004791-D6, 1-866004791-D7, 1-866004791-D8, 1-866004791-D9, 1-866004791-E3, 1-866004791-E5, 1-866004791-E6, 1-866004791-E7, 1-866004791-E8, 1-866004791-E9.	75080628
	State Treasurer's Office, State Capitol, Phoenix, Arizona, 85007	1-956000924-A1, 1-956000924-A2	
California	County of San Diego, 1-95000934-A2		75080386
	Auditor and Controller, County of San Diego, County Administration Center, 1600 Pacific Highway, San Diego, California 92101.		
	University of California, 1-900001727-A1		75081471
	Letter of Credit, Universities of California, Berkeley, California 94720		
	Santa Barbara	1-956006145-A1, 1-956006145-A2	75081471
	San Diego	1-956006144-A1, 1-956006144-A2, 1-956006144-A3	75081471
	Davis	1-946036494-A1	75081471
	Los Angeles	1-956006143-A1, 1-956006143-A2, 1-956006143-A3, 1-956006143-A4, 1-956006143-A6.	75081471
	Irvine	1-952226406-A1, 1-952226406-A2	75081471
	Berkeley	1-946002133-A1, 1-946002133-A2	75081471
Connecticut	Riverside	1-237361894-A1, 1-956006142-A1	75081471
	Santa Cruz	1-941539563-A1	75081471
	San Francisco	1-946036493-A1, 1-946036493-A6, 1-946036493-A7, 1-946036493-A8	75081471
	Los Alamos Lab	1-856004458-A1	75081471
	Lawrence Livermore Lab	1-946031193-A1	75081471
	Scipps Clinic and Res. Frdn	1-951684089-A1	75087560
	Comptroller, Scipps Clinic and Res. Frdn. 476 Prospect Street, La Jolla, California 92037.		
	Yale University, 1-060646973-A1	1-060646973-A1, 1-060646973-A2, 1-060646973-A4.	75089755

## ATTACHMENT I TO CHAPTER 3—SINGLE LETTER OF CREDIT RECIPIENTS AND CENTRAL POINT ADDRESSES—Continued

State	Organization and payee No.	Recipient CRS-EIN <sup>1</sup>	Letter of credit
District of Columbia	Treasurer, Yale University, Grants and Contracts, 155 Whitney Avenue, New Haven, Conn. 05611.	1-060646973-A5, 1-060646973-A6, 1-060646973-A7, 1-060646973-A8	.....
	Georgetown University, 1-530196603-A1	1-530196603-A1, 1-530196603-A2, 1-530196603-A3	75083450
	Treasurer, Georgetown University, 37th and O Streets NW., Washington, D.C. 20007.	1-530196603-A4, 1-530196603-A5, 1-530196603-A6, 1-530196603-A7	.....
	George Washington University, 1-530196584-A1	1-530196584-A1, 1-530196584-A3	75083441
Florida	Treasurer, George Washington University, Rice Hall, Washington, D.C. 20006.	.....	.....
	Gorgas Memorial Institute, 1-530196518-A1	1-530196518-A1	75083522
	Treasurer, Gorgas Memorial Institute, 2007 I Street NW., Washington, D.C. 20007.	.....	.....
	National Academy of Sciences, 1-530196932-A1	1-530196932-A1, 1-530196932-A2	75085992
Georgia	Treasurer, National Academy of Sciences, 2101 Constitution, Avenue NW., Washington, D.C. 20037.	.....	.....
	University of Florida, 1-596001874-C7, Fiscal Contract Officer, University of Florida, Room 106, R. Johnson Hall, Gainesville, Florida 32611.	1-596001874-C7, 1-596001874-F2	75083326
	University of Miami, 1-590624458-A1	1-590624458-A1, 1-590624458-A2, 1-590624458-A3	75085253
	Chief Accountant, University of Miami, P.O. Box 9057, Coral Gables, Florida 33124.	1-590624458-A6	.....
Guam	State of Georgia, 1-581130678-A1	1-580973190-A2, 1-581130678-A1, 1-581130678-A5, .....	75083462
	Director, Department of Adm. Services, Fiscal Division, Pryor-Mitchell Building, Atlanta, Georgia 30334.	1-581130678-A6, 1-5860002046-A2, 1-586002042-A1, 1-586002042-A2, 1-586002042-A3, 1-586002042-A4, 1-586002042-A6, 1-900000257-A1, 1-900000648-A1.	.....
	Territory of Guam, 1-980018947-E6	1-000040215-A1, 1-000040218-A1, 1-000040228-A1	7508B368
	Department of Administration, P.O. Box 884, Government of Guam, Agana, Guam 96110.	1-000040238-A1, 1-000307495-A1, 1-000313462-A1, 1-000000270-A1, 1-90000273-A1, 1-900000274-A1, 1-980018947-A1, 1-980018947-A2, 1-980018947-A3, 1-980018947-A4, 1-980018947-A7, 1-980018947-A8, 1-980018947-A9, 1-980018947-B1, 1-980018947-B2, 1-980018947-B3, 1-980018947-B5, 1-980018947-D1, 1-980018947-E5, 1-980018947-E7, 1-980018947-F1.	.....
Illinois	University of Illinois Medical Center, 1-376000511-A5	1-376000511-A1, 1-376000511-A3, 1-376000511-A5, 1-376000511-A8	75083885
	Business Manager, University of Illinois, Chicago, Illinois, P.O. Box 6998, Chicago, Illinois 60680.	01-376000511-A9, 1-376000511-B2, 1-376000511-B4, 1-376000511-B5, 1-376000511-C1, 1-376000511-C2, 1-376000511-C3.	.....
Kansas	Kansas State University 1-480771751-A1, Comptroller, Kansas State University of Agriculture & Applied Sciences, Anderson Hall, Manhattan, Kansas 66502.	1-480771751-A1, 1-480771751-A2	75084200
Louisiana	State of Louisiana, 1-900001516-A1, .....	1-000014399-A1, 1-000014607-A1, 1-237208290-A1	75080020

Department of Health and Human Services

Ch. 3, Attach. I

Maine .....	Jackson Laboratories, 1-010211513-A1 .....	1-237208290-A2, 1-720591509-A1, 1-720637038-A1, 1-720637038-A2, 1-720645546-A1, 1-720650883-A1, 1-720695435-A1, 1-720707278-A1, 1-720600720-A1, 1-726000733-A1, 1-726000734-A1, 1-726000734-A2, 1-726000734-A3, 1-726000743-A1, 1-726000745-A1, 1-726000756-A1, 1-726000766-A1, 1-726000800-A1, 1-726000800-A2, 1-726000813-A1, 1-726000821-A1, 1-726000821-A2, 1-726000821-A3, 1-726000821-A4, 1-726000821-A5, 1-726000826-A1, 1-726001901-A1, 1-726011595-A1, 1-726011595-A3, 1-726011595-A5, 1-726011595-A6, 1-726011595-A8, 1-726011595-A9, 1-726012498-A1, 1-726014571-A1, 1-726101595-A1, 1-900001256-A1, 1-900001342-A1, 1-900002575-A1, 1-01211513-A1 .....	75087315
Massachusetts .....	Financial Officer, The Jackson Laboratories, Otter Creek Road, Bar Harbor, Maine 04609. Comptroller, Boston University, 755 Commonwealth Avenue, Boston, Mass. 02215. Forsyth Dental Center, 1-042104230-A2 .....	1-042103547-A1, 1-042103547-A2, 1-042103547-A4, .....	75081272
	Assistant Treasurer, Forsyth Dental Center, 140 Fenway, Boston, Mass. 02115. Harvard University 1-042103580-B1 .....	1-042104230-A1, 1-042104230-A2 .....	75083375
	Office of the Comptroller .....	1-042103580-A2, 1-042103580-A3, 1-042103580-A4, .....	75083630
	President & Fellows of Harvard College Cambridge, Mass. 02138 .....	1-042103580-A5, 1-042103580-A6 .....	.....
	Massachusetts General Hospital, 1-041564655-A4 .....	1-042103580-A7, 1-042103580-A8, 1-042103580-A9, 1-042103580-B1 .....	75084810
	Treasurer, Massachusetts General Hospital, 45 Milk Street, Boston, Mass. 02114. Massachusetts Institute of Technology, 1-042103594-A1 .....	1-041564655-A3, 1-041564655-A4 .....	.....
	Fiscal Officer, Division of Sponsored Research, Massachusetts Institute of Technology, Cambridge, Mass. 02139. Worcester Foundation, 1-042121658-A1 .....	1-042103594-A1, 1-042103594-A2 .....	75084836
Maryland .....	Finance Officer, Worcester Foundation for Experimental Biology, Inc., 222 Maple Avenue, Shrewsbury, Massachusetts 01545. Johns Hopkins University, 1-520595110-A5, University Budget Officer Johns Hopkins University, Garland Hall, Rm 327, Charles and 34th Streets, Baltimore, Md. 21218. University of Michigan, 1-386006309-A1 .....	1-042121658-A1 .....	75089680
Michigan .....	University Cashier, Regents of the University of Michigan, 1015 L.S. & A. Bldg., Ann Arbor, Michigan 48104. Mayo Foundation, 1-416011702-A1 .....	1-000701501-A1, 1-520595110-A1, 1-520595110-A2, 1-520595110-A3, 1-520595110-A4, 1-520595110-A5, .....	75084130
Minnesota .....	Treasurer, Mayo Foundation, 200 First Street, SW., Rochester, Minnesota 55901. University of Minnesota, 1-416007513-A5 .....	1-386006309-A1, 1-386006309-A2, 1-386006309-A3 .....	75085301
	Director, Research Administration, 105 Admin. Servs. Building, 2610 University Avenue, St. Paul, Minnesota 55114. Midwest Research Institute, 1-440545878-A1 .....	1-386006309-A4, 1-386006309-A5, 1-386006309-A6, 1-386006309-A7, 1-386006309-A8, 1-386006309-A9, 1-386006309-B1, 1-386006309-B2, .....	.....
Missouri .....	Treasurer, Midwest Research Institute, 425 Volker Blvd., Kansas City, Missouri 64110. State of Nebraska, 1-470491233-C5 .....	1-4160011702-A1, 1-4160011702-A2 .....	75084875
Nebraska .....		1-416007513-A1, 1-416007513-A2, 1-416007513-A3, .....	75085448
		1-416007513-A5, 1-416007513-A8, 1-416007513-B2, 1-416007513-B3, 1-416007513-B4, 1-416007513-B5, 1-416007513-B7, .....	.....
		1-440545878-A1 .....	75085361
		.....	.....
		1-000021900-A1, 1-210674761-A1, 1-470491233-A1 .....	75086320

## ATTACHMENT I TO CHAPTER 3—SINGLE LETTER OF CREDIT RECIPIENTS AND CENTRAL POINT ADDRESSES—Continued

State	Organization and payee No.	Recipient CRS-EIN <sup>1</sup>	Letter of credit
New York	State of Nebraska Accounting Dept., Administrative Services Office, State Capitol Bldg., Lincoln, Nebraska 68509.	1-470491233-A3, 1-470491233-A4, 1-470491233-A6, 1-470491233-A7, 1-470491233-A8, 1-470491233-A9, 1-470491233-B1, 1-470491233-B2, 1-470491233-B3, 1-470491233-B4, 1-470491233-B5, 1-470491233-B6, 1-470491233-B7, 1-470491233-B8, 1-470491233-B9, 1-470491233-C1, 1-470491233-C2, 1-470491233-C3, 1-470491233-C4, 1-470491233-C5, 1-470491233-C6, 1-470491233-C7, 1-470491233-C8, 1-470491233-C9, 1-470491233-D1, 1-470491233-D2, 1-470491233-D4, 1-476000479-A1, 1-476000535-A1, 1-476000535-A8, 1-741699874-A1, 1-900001910-A1, 1-900001919-A1, 1-900002209-A1, 1-900002333-A1, 1-900003427-A1, 1-900003437-A1, 1-111630741-A1	75080040
	Adelphi University, 1-111630741-A1 Business Manager, Adelphi University, South Avenue, Garden City, New York 11530.	1-141338310-A1	75080150
	Albany Medical Center, 1-141338310-A1 Assistant Treasurer, Albany Medical College of Union University, 47 New Scotland Avenue, Albany, New York 12208.	1-160748423-A1	75082160
	Children's Hospital of Buffalo, 1-160748423-A1 Comptroller, Children's Hospital of Buffalo, 219 Bryant Street, Buffalo, N.Y. 14222.	1-131099420-A1	75086270
	New York Medical College, 1-131099420-A1 Treasurer, New York Medical College, Flower/Fifth Avenue Hospitals, 1 East 105th Street, New York, N.Y. 10029.	1-135562308-A1, 1-135562308-A3, 1-135562308-A4 1-135562308-A5, 1-135562308-A6	75086330
	New York University, 1-135562308-A1 Assistant Controller, New York University, 500 Kimball Hall, Washington Square, New York, New York 10003.	1-135562308-A2, 1-135562308-B1, 1-135562309-A1, 1-135562309-A2 1-135562309-A3, 1-229124053-A1	75086333
	New York University Medical Center, 1-135562309-A1 Comptroller, New York University Medical Center, 550 First Avenue, New York, New York 10016.	1-160743209-A1, 1-160743209-A2, 1-160743209-A3, 1-160743209-A4, 1-160743209-A5.	7508272
	University of Rochester, 1-160743209-A1, Research Accountant University of Rochester, River Campus, Rochester, New York 14627.	1-131819472-A1, 1-132633612-A1, 1-141368361-A1, 1-141368361-A2, 1-141368361-J3, 1-146013200-E4, 1-146013200-E5, 1-146013200-E6, 1-146013200-E7, 1-146013200-E8, 1-146013200-E9, 1-146013200-F1, 1-146013200-F2, 1-146013200-F3, 1-146013200-F4, 1-146013200-F5, 1-146013200-F6, 1-146013200-F7, 1-146013200-F8, 1-146013200-F9, 1-146013200-G1, 1-146013200-G2, 1-146013200-G3, 1-146013200-G4, 1-146013200-G5, 1-146013200-G6, 1-146013200-G7, 1-146013200-G8, 1-146013200-G9, 1-146013200-H1, 1-146013200-H2, 1-146013200-H3, 1-146013200-H4, 1-146013200-J3, 1-146013200-K4, 1-146013200-L5, 1-146013200-L6, 1-146013200-L7.	75087210
	Research Foundation of the City, University of New York, 1-131988190-A1 Treasurer, Research Foundation of the City, University of New York, 1411 Broadway, New York, New York 10018.	1-131988190-A1, 1-131988190-A8	75082337
	State of New York, 1-146013200-J7	1-146013200-A1, 1-146013200-A2, 1-146013200-A3	75086340

Department of Health and Human Services

Ch. 3, Attach. I

Ohio .....	Director, State Accounts, Alfred E. Smith, Building, Albany, New York 12225.	1-146013200-A4, 1-146013200-A5, 1-146013200-A6, 1-146013200-A7, 1-146013200-A8, 1-146013200-A9, 1-146013200-B1, 1-146013200-B2, 1-146013200-B3, 1-146013200-B4, 1-146013200-B5, 1-146013200-B6, 1-146013200-B7, 1-146013200-B8, 1-146013200-B9, 1-146013200-C1, 1-146013200-C2, 1-146013200-C3, 1-146013200-C4, 1-146013200-C5, 1-146013200-C6, 1-146013200-C8, 1-146013200-C9, 1-146013200-D1, 1-146013200-D2, 1-146013200-D3, 1-146013200-D4, 1-146013200-D5, 1-146013200-D6, 1-146013200-D7, 1-146013200-D9, 1-146013200-E1, 1-146013200-E2, 1-146013200-E3, 1-146013200-H5, 1-146013200-H6, 1-146013200-H7, 1-146013200-H8, 1-146013200-H9, 1-146013200-I1, 1-146013200-I2, 1-146013200-I3, 1-146013200-I4, 1-146013200-I7, 1-146013200-I8, 1-146013200-J1, 1-146013200-J4, 1-146013200-J5, 1-146013200-J6, 1-146013200-J7, 1-146013200-J8, 1-146013200-J9, 1-146013200-K1, 1-146013200-K2, 1-146013200-K3, 1-146013200-K6, 1-146013200-K7, 1-146013200-K9, 1-146013200-L3, 1-146013200-L4, 1-146013200-L8.	75089472
	Case Western Reserve University, 1-341018992-A1 .....	1-341018992-A4, 1-341018992-A1, 1-341018992-A2 .....	.....
Tennessee .....	Comptroller Case Western Reserve University, 2040 Adelbert Road, Cleveland, Ohio 44106.	1-62646012-A1 .....	75083427
	St. Jude's Children's Research Hospital, 1-620646012-A1 .....	.....	.....
Texas .....	Treasurer, St. Jude's Children's Hospital, 332 N. Lauderdale, Memphis, Tennessee 38101.	1-741613878-A1, 1-741613878-A2 .....	75081070
	Baylor University College of Medicine, 1-741613878-A2 .....	.....	.....
Utah .....	Business Manager, Baylor College of Medicine, 1200 Moursund Ave., Houston, Texas 77025.	1-741761309-A4, 1-741761309-A6 .....	75088056
	University of Texas at Houston Health Center, 1-741761309-A4 .....	.....	.....
Washington .....	Associate Dean for Business Affairs, University of Texas, Medical School, P.O. Box 20036 Houston, Texas 77025.	1-756002868-A3, 1-756002868-A4, 1-756002868-A5 .....	75088130
	University of Texas Medical School, 1-756002868-A4 .....	.....	.....
Wisconsin .....	Business Manager, University of Texas, Southwestern Medical Schools, 5323 Harry Hines Blvd., Dallas, Tex 75235.	1746001118-A1 .....	75088910
	University of Texas, M.D. Anderson Hospital, 1-746001118-A1 .....	.....	.....
Washington .....	Supervisor, Grant Reporting, M.D. Anderson Hospital, University of Texas, 6723 Bernier Ave., Houston, Texas 77025.	1-74600949-A1 .....	75088916
	University of Texas Medical Branch, Galveston, Texas, 1-74600949-A1 .....	.....	.....
Utah .....	Business Manager, University of Texas, Medical Branch, 1000 Strand, Galveston, Texas 77550.	1-876000525-A1, 1-876000525-A2, 1-876000525-A3, 1-876000525-A6, 1-876000525-A7, 1-876000525-A8 .....	75089067
	University of Utah and University of Utah Research 1-876000525-A6 .....	.....	.....
Washington .....	Controller, University of Utah, 122 Park Building, Salt Lake City, Utah 84112.	1-916001537-A1, 1-916001537-A2, 1-916001537-A4, 1-916001537-A5, 1-916001537-A6, 1-916001537-A9.	75089320
	University of Washington, 1-916001537-A5, Director, Office of Grant/Contract Services, University of Washington, 211 Administration Building, Seattle, Washington 98195.	1-000039594-A1, 1-000702000-A1, 1-390808464-A1 .....	7508H610
Wisconsin .....	State of Wisconsin, 1-396006469-B1 .....	.....	.....
	.....	.....	.....

## ATTACHMENT I TO CHAPTER 3—SINGLE LETTER OF CREDIT RECIPIENTS AND CENTRAL POINT ADDRESSES—Continued

State	Organization and payee No.	Recipient CRS-EIN <sup>1</sup>	Letter of credit
	Budget Operations, State Budget Office, One West Wilson St., Madison Wisconsin 53607.	1–391051231–A1, 1–396006436–A1, 1–396006443–A3, 1–396006447–A1, 1–396006461–A1, 1–396006461–A2, 1–396006461–A3, 1–396006461–A4, 1–396006461–A5, 1–396006461–A6, 1–396006461–A7, 1–396006461–A8, 1–396006461–A9, 1–396006461–B1, 1–396006466–A1, 1–396006469–A1, 1–396006469–A5, 1–396006469–A6, 1–396006469–A7, 1–396006469–B1, 1–396006469–B5, 1–396006487–A1, 1–396006487–A2, 1–396006488–A1, 1–396006492–A1, 1–396006492–A2, 1–396006492–A3, 1–396006492–A5, 1–396006492–A6, 1–396006492–A7, 1–396006492–A8, 1–396006492–B1, 1–396006492–B2, 1–396006492–B3, 1–396006492–B4, 1–396006492–B5, 1–396006492–B6, 1–396006492–B7, 1–396006492–B8, 1–396006492–B9, 1–396006492–C1, 1–396006492–C2, 1–396006492–C3, 1–396006492–C4, 1–396006492–C5, 1–396006492–C6, 1–396006492–C7, 1–396006492–C8, 1–396006492–C9, 1–396006492–D1, 1–396028867–A1, 1–396028867–A2, 1–396091677–A1, 1–396091677–A2, 1–396320507–A1, 1–900000222–A1, 1–900002012–A1, 1–900002564–A1, 1–900002665–A1, 1–900003134–A1.	.....

<sup>1</sup>Central Registry-System Entity Identification Number (CRS-EIN).

CRS-EIN is a twelve digit number used to identify a recipient organization/individual in the HHS Central Registry System (CRS). This system utilizes a standard identification number within HHS to identify recipients of Federal assistance-like programs. The first digit identifies whether the recipient is an organization (1) or individual (2). The next nine (9) digits uniquely associate the organization/individual to an Employer Identification Number assigned by the Internal Revenue Service in the case of an organization, or a Social Security Number assigned by the Social Security Administration in the case of an individual. A two character suffix code is assigned by the Central Registry System, HHS, to identify component levels within the recipient organization, such as: School of Medicine, Research Division, Department of Biology, etc. A suffix is not applied to a Social Security Number since that number is unique to each individual.

[49 FR 14049, Apr. 9, 1984, Redesignated at 49 FR 36110, Sept. 14, 1984]

## ATTACHMENT II—HHSAR SUBJECT INDEX

EDITORIAL NOTE: This listing is provided for information purposes only. It is compiled and kept up-to-date by the Department of Health and Human Services.

“A-76” .....	307.3
Accessibility of Meetings, Conferences, and Seminars to Persons with Disabilities .....	370.1
Acquisition Planning .....	307.1
Contents of .....	307.105
Administration of HHSAR .....	301.201
Administration, Post-Award Contract .....	342.70
ADP Review and Clearance .....	339.7001
ADP Systems Security .....	339.7002
Advance Acquisition Planning (Scheduling) .....	307.71
Advance Payments .....	332.4
Advertisements, Paid .....	305.5
Advocates for Competition .....	306.5
Agency Acquisition Regulations .....	301.3
Agency Head .....	302.1
Amendments to Solicitations .....	315.410
Announcement of Contract Award .....	305.303
Antitrust Violations .....	303.303
Appeals, Disputes and .....	333.2
Appointment of Contracting Officers .....	301.603
Arrangement of Regulation .....	301.104-2
Audiovisual Materials, Acquisition Clearance of .....	307.105-2(a)(14)
Audit, Closing Completed Contracts .....	304.804-1
Award Instrument, Selection of .....	307.70
Balance of Payments Program .....	325.302
Basic Agreements .....	316.702
Basic Agreements, Numbering of .....	304.7004
Basic Ordering Agreements, Numbering of .....	304.7005
Best and Final Offers .....	315.611
Blanket Purchase Agreements .....	313.2
Business Proposal Instructions .....	315.406-5(b)(3)
Buy American Act .....	325.1
Excepted Articles, Materials, Supplies .....	325.108
Formats for Nonavailability Determinations .....	325.108-70
Certifications, Representations and .....	315.406-5
Chief of Contracting Office .....	302.100
Class Determinations and Findings .....	301.703
Class Deviation .....	301.404
Clauses, Special Contract .....	352.2
Closing Completed Contracts .....	304.804
Closing Review (of Contracts) .....	304.870
Coding of HHSAR .....	301.104-1
Competition Advocates .....	306.5
Competition Requirements .....	306
Competitive Range .....	315.609
Completion (Work Statement) .....	307.105-3
Confidentiality of Information .....	324.70
Considerations in Selecting an Award Instrument .....	307.70
Consolidated Acquisitions .....	317.70

## 48 CFR Ch. 3 (10–1–97 Edition)

Consulting Services .....	337.2
Contingent Fee Violations .....	303.409
Contract Awards:	
Announcement of .....	305.303
Review and Approval of Proposed .....	304.71
Contract Clauses .....	352.2
Contract Closeout .....	304.804
Contract Cost and Manpower Reporting .....	342.7002(e)
Contract Distribution .....	304.201
Contract Execution .....	304.101
Contract Files .....	304.801
Contract Financing .....	332
Contract Format .....	315.406–1
Contract Funding .....	332.7
Contract Monitoring .....	342.70
Contract Numbering .....	304.7001
Contract Reporting .....	304.601
Contract Types:	
Cost-Plus-Fixed-Fee .....	316.306
Cost-Reimbursement .....	316.3
Cost Sharing .....	316.303; 335.070
Incentive .....	316.403
Time-and-Materials, Labor-Hour, and Letter .....	316.6
Contracts with Government Employees .....	303.602
Contracts, Voiding and Rescinding .....	303.704
Contracting Authority .....	301.601
Contracting Officer Selection and Appointment .....	301.603
Contracting Officer's Signature .....	304.101
Contracting with SBA .....	319.8
Contractors, Responsible Prospective .....	309.1
Contractor vs. Government Performance (A-76) .....	307.3
Cost Accounting Standards, Waiver .....	330.201–5
Cost Overruns .....	342.71
Cost/Pricing Data .....	315.804; 315.805
Cost-Reimbursement Contracts .....	316.3
Cost Sharing .....	316.303; 335.070
Data, Treatment of (in Contract Proposals) .....	315.413
DCIS (Departmental Contract Information System) .....	304.601
Debarment, Suspension, and Ineligibility .....	309.4
Debriefing of Unsuccessful Offerors .....	315.1003
Definitions .....	302.1
Determinations and Findings .....	301.7
Determinations and Findings Format:	
Cost-Type Contract .....	316.301–3
Deviation .....	301.4
Disclosure and Use of Information Before Award .....	315.413
Discussion, Written or Oral .....	315.610
Disputes and Appeals .....	333.2
Distribution of Contract Documents .....	304.201
Duty-Free Importation of Goods .....	325.1
Eight-A (8a) Program (SBA) .....	319.8
Evaluation of Proposals .....	315.608
Cost or Price .....	315.608–77
Technical .....	315.608–75, and 76

## Department of Health and Human Services

Evaluation Factors (RFP) .....	315.406-5(c)
Evaluators, Use of Outside .....	315.608-71(f)
Exclusion of Sources .....	306.2
Execution of Contract .....	304.101
Executive Committee for Acquisition .....	301.202
Expert and Consulting Services .....	337.2
Facsimile Bids .....	314.202-7
Facsimile Proposals .....	315.402
Federal Procurement Data System .....	See DCIS
Field Pricing Support .....	315.805-5
Final Indirect Cost Rates .....	342.705
Financing, Contract .....	332
Foreign Purchases .....	325
Forms, Acquisition (Illustration of) .....	353.3
Freedom of Information Act (FOIA) .....	324.2
Full and Open Competition After Exclusion of Sources .....	306.2
Funding Contracts .....	332.7
Government Employees Training Act (Acquisition Under) .....	317.71
Government Property .....	345
Gratuities, Contractor (to Government Personnel) .....	303.203
Head of the Agency .....	302.1
Head of Contracting Activity .....	301.670
Imprest Fund .....	313.4
Incremental Funding of Cost-Reimbursement Contracts .....	332.702
Indirect Cost Rates .....	342.705
Indian Preference .....	370.2
Individual Deviation .....	301.403
Ineligibility .....	309.4
Institutional Cost-Sharing Agreements .....	335.070-4
Invoice Processing .....	332.905
Justification for Other than Full and Open Competition .....	306.303
Labor Surplus Area Concerns .....	320.1
Letter Contract .....	316.603
Letter of Credit, Recipients and Central Point Addressees .....	Attachment I
Letters of Credit .....	332.406
Letters of Intent .....	316.770-1
Limitation of Costs or Funds .....	332.704
Major System Acquisition .....	334.003
Meetings, Conferences, Seminars (Accessibility to for Disabled) .....	370.1
Memorandums of Understanding .....	316.770-2
Mistakes in Bids .....	314.406 (315.607)
Before Award .....	314.406-3
After Award .....	314.406-4
Monitoring, Contract .....	342.70
Negotiation Memorandum, Preparation of .....	315.672
Negotiation with Selected Source .....	315.670
Notifications to Offerors .....	315.1001
Numbering System, Acquisition Instrument Identification ....	304.70
OMB Control Numbers .....	301.105
Options .....	317.2
Other than Full and Open Competition .....	306.3
Paid Advertisements .....	305.5
Paperwork Reduction Act (Clause) .....	352.270-7
Personal Service Contracts .....	337.104
Phasing .....	307.105-3
Plan, Subcontracting, Small and Disadvantaged Businesses ..	319.705
Plan, Technical Evaluation .....	315.608-70
Planning, Acquisition .....	307.1
Post Negotiation Contract Preparation and Award .....	315.671
Postaward Orientation (Letters) .....	342.504

## 48 CFR Ch. 3 (10–1–97 Edition)

Pre-Proposal Conferences .....	315.409
Presolicitation Notices and Conferences .....	315.404
Price Negotiation .....	315.805
Pricing Data .....	See Cost/Pricing Data
Principal Official Responsible for Acquisition .....	302.1
Privacy Act .....	324.1
Processing Requests for Training .....	317.7102
Profit or Free (Structured Approach) .....	315.905–70
Program Personnel Responsibilities:	
Accessibility of Meetings, Conferences, Seminars to Persons with Disabilities .....	370.102(b)
ADP Clearances .....	339.7001
ADP Systems Security .....	339.7002
Award Instrument, Selecting .....	307.7004
Business Practices, Reporting Improper .....	303
Contract Monitoring .....	342.7002
Government Property, Providing .....	345.370(c)
Other than Full and Open Competition:	
Approval of JOFOC .....	306.304
Circumstances Permitting .....	306.302
Preparing JOFOC .....	306.303
Planning:	
Advance Acquisition (Scheduling) .....	307.71
Acquisition Document:	
Content .....	307.105
Preparation .....	307.104–3
Responsibility .....	307.104–2
Special Program Clearances .....	307.105–2
Statement of Work .....	307.105–3
Privacy Act:	
Determination .....	324.102
System Notice .....	324.103
Request for Contract:	
Content .....	315.7004
Procedures .....	315.7002
Responsibilities .....	315.7003
Request for Proposals:	
Evaluation Criteria Development .....	315.406–5(c)
Preparation .....	315.406
Technical Proposal Instructions .....	315.406–5(b)(2)
Source Selection:	
Competitive Range .....	315.609(i)
Evaluation of Proposals (Need for Confidentiality) .....	315.604(d)
Handling and Disclosing Proposals .....	315.608–72
Rating and Ranking Proposals .....	315.608–75
Technical Evaluation Panel .....	315.608–71, 74
Technical Evaluation Plan .....	315.608–70
Technical Evaluation Report .....	315.608–76
Training .....	307.170
Program Training Requirements .....	307.170
Progress Payments, Unusual .....	332.501
Prompt Payment .....	332.9
Prompt Payment .....	332.905
Proposals, Evaluation of .....	315.608
Proposals, Unsolicited .....	315.5
Proposed Contract Awards, Review and Approval of .....	304.71
Protective Services .....	337.109

## Department of Health and Human Services

Protests Against Award .....	333.1
Providing Government Property .....	345.370
Provisions, Solicitation .....	352.2; 315.407
Purchase Descriptions, Statements of Work, Specifications ...	307.105-3
Purchase Orders .....	313.5
Purchase Orders, Numbering of .....	304.7003
Ratification of Unauthorized Commitments .....	301.602-3
Records of Contract Actions .....	304.801
References and Citations to HHSAR and FAR .....	301.104-2(c)
Regulation System .....	301.101
Rejection of Bids (After Opening) .....	314.404
Relative Importance or Weight (Evaluation Criteria) .....	315.406-5(c)(4)
Representations and Certifications .....	315.406-5
Annual Submission .....	314.213; 315.471
Requests for Contract-Content, Format, Procedures .....	315.70
Requests for Proposals:	
Review .....	315.470
Preparation and Contents .....	315.406
Requests for Quotations .....	313.107; 315.406
Rescinding Contracts .....	303.7
Research and Development Contracts .....	335.070
Response Time for Solicitations .....	315.408
Responsible Prospective Contractors .....	309.1
Retention of Files .....	FAR 4.805
Review and Approval of Proposed Contract Awards .....	304.71
Review and Approval of JOFOC's .....	306.304
Review of Requests for Contracts .....	315.7007
Review of Requests for Proposals .....	315.470
Review of Work Statements .....	315.7004
Revisions to HHSAR .....	301.206
Scheduling .....	307.71
Selection of Contracting Officers .....	301.603
Selection of Offerors .....	315.609
Service Contracts in General .....	337.1
Set-Asides for Small Business .....	319.5
Small Business and Small Disadvantaged Business Concerns .	319
Small and Disadvantaged Business Utilization Specialist (SADBUS) .....	319.201-70
Small Purchases .....	313.1
Solicitations:	
Amendment .....	315.410
Availability .....	305.102
Issuance .....	315.408
Information and Planning Purposes .....	315.405
Numbering .....	304.7002
Provisions .....	352.2
Source List .....	315.7005(a)(7)
Source Selection .....	315.6
Special Contract Clauses .....	352.2
Special Program Clearances and Approvals .....	307.105-2; 315.7005(a)(8)
Specifications, Purchase Descriptions, Statements of Work ...	307.105-3
Standards of Conduct .....	303.101-3
Statements of Work, Specifications, Purchase Descriptions ...	307.105-3
Subcontracting with Small and Disadvantaged Businesses .....	319.7
Subcontractor Kickbacks .....	303.502
Synopsizing, Exceptions to .....	305.202
System, Departmental Contract Information (DCIS) .....	304.601

48 CFR Ch. 3 (10–1–97 Edition)

Systems (ADP) Security .....	339.7002
Technical Evaluation Panel .....	315.608–71
Technical Evaluation Plan .....	315.608–70
Technical Evaluation Report .....	315.608–76
Technical Proposal Instructions .....	315.406–5(b)(2)
Training, Processing Requests for .....	317.7102
Treatment of Data in Contract Proposals .....	315.413
Term or Level of Effort Work Statement .....	307.105–3
Time-and-Materials Contract .....	316.601
Unauthorized Commitments, Ratification of .....	301.602–3
Unauthorized Types of Agreements .....	316.770
Unsolicited Proposals .....	315.5
Voiding Contracts .....	303.704
Walsh-Healey Act .....	322.6
Weight, Relative Importance (Evaluation Criteria) .....	315.406–5(c)(4)
Withdrawing or Modifying Small Business Set-Aside .....	319.506
Withholding of Payments .....	342.7003
Year-end Acquisitions .....	307.71

## APPENDIX A—PUBLIC HEALTH SERVICE

(Parts PHS 300 to PHS 399)

---

SUBCHAPTER A—GENERAL		
<i>PHS Part</i>		<i>Page</i>
301	PHS Acquisition Regulation System .....	158
302	Definitions of words and terms .....	160
304	Administrative matters .....	160
SUBCHAPTER B—ACQUISITION PLANNING		
305	Publicizing contract actions .....	164
306	Competition requirements .....	164
SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES		
314	Formal advertising .....	165
315	Contracting by negotiation .....	165
SUBCHAPTER D—SOCIOECONOMIC PROGRAMS		
323	Environment, conservation, and occupational safety .....	166
SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS		
333	Protests, disputes, and appeals .....	168
SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING		
335	Research and development contracting .....	169
336	Construction and architect-engineer contracts .....	169
SUBCHAPTER H—CLAUSES AND FORMS		
352	Solicitation provisions and contract clauses .....	171
SUBCHAPTER T—PHS SUPPLEMENTATIONS		
380	Special program requirements affecting PHS acquisitions .....	210



## SUBCHAPTER A—GENERAL

### PART PHS 301—PHS ACQUISITION REGULATION SYSTEM

#### Subpart PHS 301.1—Purpose, Authority, Issuance

Sec.

PHS 301.101 Purpose.

PHS 301.102 Authority.

PHS 301.103 Applicability.

PHS 301.104 Issuance.

PHS 301.104-1 Publication and code arrangement.

PHS 301.104-2 Arrangement of regulations.

PHS 301.104-3 Copies.

PHS 301.105 OMB approval under the Paperwork Reduction Act.

#### Subpart PHS 301.2—Administration

PHS 301.201 Maintenance of the PHSAR.

PHS 301.270 Procurement Management Advisory Committee.

PHS 301.271 Timing of PHSAR revisions.

#### Subpart PHS 301.4—Deviations From the FAR

PHS 301.470 Procedure.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 36237, Sept. 14, 1984, unless otherwise noted.

#### Subpart PHS 301.1—Purpose, Authority, Issuance

##### PHS 301.101 Purpose.

(a) The Public Health Service Acquisition Regulation (PHSAR) is issued to establish uniform acquisition policies and procedures throughout PHS which are necessary to implement or supplement the Department of Health and Human Services Acquisition Regulation (HHSAR).

(b) PHS issuances do not reiterate material published in the HHSAR or the Federal Acquisition Regulation (FAR).

(c) The PHSAR implements and supplements the HHSAR. Implementing material expands upon or indicates the manner of compliance with the related HHSAR. Supplementing material is new material which has no counterpart in the HHSAR. The omission of sections or subsections in PHSAR means no further explanation or qualification

is necessary for implementation within PHS. Therefore, in order to obtain comprehensive coverage and assure consideration of all acquisition policies and procedures pertinent to PHS, the FAR, HHSAR, and PHSAR should be read.

##### PHS 301.102 Authority.

(a) The HHSAR authorizes supplementation or implementation of the FAR and HHSAR in accordance with prescribed procedures (see 301.301) in order to publish essential acquisition instructions, policies, and procedures that do not conflict with, supersede or duplicate that prescribed by the FAR and the HHSAR.

##### PHS 301.103 Applicability.

The FAR, HHSAR and PHSAR issuances apply to all acquisitions made by PHS procuring activities as defined in FAR 1.103.

##### PHS 301.104 Issuance.

##### PHS 301.104-1 Publication and code arrangement.

(a) The PHSAR is published in the same forms as indicated in FAR 1.104-1(a).

(b) PHS issuances will be published on yellow pages in looseleaf form for insertion into the HHSAR.

##### PHS 301.104-2 Arrangement of regulations.

(a) *General.* The PHSAR conforms to the FAR and HHSAR with respect to divisional arrangements; i.e., subchapters, parts, subparts, sections, subsections, and paragraphs.

(c) *References and citations.*

(2) This regulation shall be referred to as the Public Health Service Acquisition Regulation (PHSAR), Appendix A to the Department of Health and Human Services Acquisition Regulation. Any reference shall be cited as "PHS" followed by the appropriate number.

(3) Citations of authority shall be incorporated where necessary. All FAR reference numbers shall be preceded by "FAR." References to the HHSAR shall

state only the number without the prefix "HHSAR."

**PHS 301.104-3 Copies.**

Copies of the PHSAR in FEDERAL REGISTER form may be purchased by the public from the Superintendent of Documents, Government Printing Office (GPO), Washington, DC 20402. Looseleaf copies of the PHSAR may be obtained by departmental personnel having a need for the document by placing an order with a Directives Distribution Coordinator in accordance with General Administration Manual Chapter 1-00, Exhibit G, HHS Staff Manual System.

**PHS 301.105 OMB approval under the Paperwork Reduction Act.**

The following OMB control numbers apply to the information collection and recordkeeping requirements contained in this regulation:

PHSAR segment	OMB control No.
All segments (excluding PHS 352.223-70 and PHS 252.232-70) .....	0990-0128
PHS 352.223-70 .....	0990-0137
PHS 352.232-70 .....	0990-0134

[49 FR 36237, Sept. 14, 1984, as amended at 51 FR 20486, June 5, 1986]

**Subpart PHS 301.2—Administration**

**PHS 301.201 Maintenance of PHSAR.**

The PHSAR is maintained by the Division of Grants and Contracts, Office of Resource Management, Office of Management, PHS. The Director, Division of Grants and Contracts is responsible for developing and preparing material to be included in the PHSAR.

**PHS 301.270 Procurement management advisory committee.**

(a) The Director, Division of Grants and Contracts has established the Procurement Management Advisory Committee (PMAC) to assist and facilitate the planning and development of acquisition policies and procedures, and the resolving of operational problems affecting all acquisition activities in the PHS.

(b) The PMAC consists of members and alternates from the Office of the Assistant Secretary for Health, Alco-

hol, Drug Abuse, and Mental Health Administration, Centers for Disease Control, Food and Drug Administration, Health Resources and Services Administration, and National Institutes of Health.

[49 FR 36237, Sept. 14, 1984, as amended at 51 FR 20486, June 5, 1986]

**PHS 301.271 Timing of PHSAR revisions.**

PHSAR revisions will be issued throughout the year as the need arises. PHS issuances shall be effective on the date cited in the FEDERAL REGISTER issuance or on the date of the transmittal notice which distributes it to PHSAR Staff Manual holders, unless otherwise directed.

**Subpart PHS 301.4—Deviations From the FAR**

**PHS 301.470 Procedure.**

(a) Requests for deviations from the FAR, HHSAR or any PHSAR issuance for implementation or supplementation shall be submitted in writing by the PHS agency principal official responsible for acquisition to the Director, Division of Grants and Contracts, ORM/OM/PHS for approval and/or further processing as may be required. When it is recognized that a deviation will be required prior to the issuance of a solicitation, the request for deviation must be processed and approved prior to release of the solicitation. When completion of a contract action is contingent on approval of a deviation, the request for deviation must be processed and approval granted by the appropriate level, prior to contract execution. In an exigency situation, initial verbal contact should be made with the Chief, Contracts Management Branch, DGC/ORM/OM/PHS or his/her designee. Only deviations to the PHSAR may be granted by the Director, Division of Grants and Contracts.

(b) Each request for deviation shall provide sufficient information to permit PHS compliance with the HHSAR. Generally, such requests shall contain the following in addition to the information required by 301.470(b):

(1) The name of the contractor and contract number, or the name of the

## Appendix A—Public Health Services

## PHS 304.170

proposed contractor and the solicitation number.

(2) A statement indicating whether or not the deviation had been previously requested. If so, outline the circumstances involved and the disposition of that request.

[49 FR 36237, Sept. 14, 1984, as amended at 51 FR 20486, June 5, 1986]

### PART PHS 302—DEFINITIONS OF WORDS AND TERMS

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

#### Subpart PHS 302.1—Definitions

##### PHS 302.170 Definitions of terms.

The following terms, when utilized in PHS supplementing or implementing issuances to the HHSAR, have the meanings set forth below.

*PHS agencies* identifies collectively that group of organizational entities within the PHS which have assigned major health functions as currently shown in the PHS Organization Handbook. The PHS agencies are as follows:

Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA)  
Centers for Disease Control (CDC)  
Food and Drug Administration (FDA)  
Health Resources and Services Administration (HRSA)  
National Institutes of Health (NIH)

*PHS agency heads* identifies collectively those individuals who are given the responsibility and authority to manage and direct the efforts of the PHS agencies. These are the Administrators of ADAMHA and HRSA, Commissioner of FDA, and Directors of NIH and CDC.

*PHS contracting activities* identifies collectively those organizational elements of the PHS staff offices and the PHS agencies which have functional responsibility to contract for the acquisition of personal property and nonpersonal services.

[49 FR 36238, Sept. 14, 1984]

### PART PHS 304—ADMINISTRATIVE MATTERS

#### Subpart PHS 304.1—Contract Execution

Sec.

PHS 304.170 Ratification of unauthorized contract awards.

#### Subpart PHS 304.6—Contract Reporting

PHS 304.670 PHS Contract Information System.

PHS 304.670-1 Policy.

PHS 304.670-2 PHS agency implementation.

#### Subpart PHS 304.71—Review and Approval of Proposed Contract Awards

PHS 304.7101 Contracts requiring review and approval.

PHS 304.7102 Conduct of the review.

AUTHORITY: 5 U.S.C. 301, 40 U.S.C. 486(c).

SOURCE: 49 FR 36238, Sept. 14, 1984, unless otherwise noted.

#### Subpart PHS 304.1—Contract Execution

##### PHS 304.170 Ratification of unauthorized contract awards.

(c)(2) Where ratification of an unauthorized contract action within a PHS agency is requested, the contracting officer shall forward the file through acquisition channels to an official at an organizational level above the contracting officer. He/she in turn shall analyze and evaluate the contracting officer's submission and make appropriate recommendations regarding ratification to the head of the contracting activity.

The Administrative Services Center (ASC), Office of Management (OM), will submit its requests for ratification to the Director, OM through the Division of Grants and Contracts (DGC), Office of Resource Management, OM/PHS.

(c)(4)(i) PHS agencies, and ASC, OM/PHS, shall submit a report of ratification data as specified in 304.170. PHS agencies with several contracting offices will be required to collect the required information from these activities and submit a consolidated agency report.

(ii) These reports shall be submitted to DGC/ORM/OM/PHS within 20 days following the expiration of the reporting period. A consolidated PHS report will be prepared for submission to the Deputy Assistant Secretary for Procurement, Assistance, and Logistics as specified in 304.170.

### Subpart PHS 304.6—Contract Reporting

#### PHS 304.670 PHS Contract Information System (PHSCIS).

The PHS Contract Information System consolidates all PHS contract data for the Department-wide Contract Information System (DCIS) from the PHS contracting activities.

#### PHS 304.670-1 Policy

The PHS principal officials responsible for acquisition (PORA) are responsible for ensuring that all required information is collected, submitted, and received into the PHSCIS in accordance with the central PHSCIS User Manual.

[49 FR 36238, Sept. 14, 1984, as amended at 51 FR 20486, June 5, 1986]

#### PHS 304.670-2 PHS agency implementation.

It is the responsibility of the PORAs to develop and implement appropriate procedures within their activities to ensure that data submissions to the PHSCIS are timely, error free, and contain all the required information.

### Subpart PHS 304.71—Review and Approval of Proposed Contract Awards

#### PHS 304.7101 Contracts requiring review and approval.

(b)(2)(i) In addition to the reviews required by 304.7101(a) and PHS 304.7101(c), internal reviews are to be conducted of acquisitions made by the following contracting offices in the National Institutes of Health for contract awards that fall below the dollar threshold for review and approval set forth in PHS 304.7101(c) but exceed the dollar threshold set forth herein:

National Cancer Institute—\$750,000

National Heart, Lung, and Blood Institute—\$500,000

National Institute of Environmental Health Sciences—\$250,000

National Institute of Allergy and Infectious Diseases—\$250,000

National Institute of Child Health and Human Development—\$250,000

Centralized procuring activity for all other National Institutes of Health Research Organizations (Research Contracts Branch)—\$250,000

These internal reviews shall be conducted by senior personnel with each contracting office. Typically, the chief of contracting office or his/her deputy should be involved in the review. Personnel involved in the contract action shall not perform the review. Each review shall be documented in writing, and any substantive issues identified shall be resolved prior to award.

(ii) Furthermore, to assure that an adequate review of smaller dollar acquisitions is made prior to award, a statistically significant sample of contract actions of dollar values, less than those amounts referenced in this section is required to be approved prior to award. This review and approval will be by the designated Reviewing Official listed in paragraph (c) (but see PHS 304.7102(a)). Records of such review actions will be maintained and will include documentation of the resolution of any significant issue raised by the review.

(iii) Contract awards and modifications of proposed architect-engineer contracts expected to exceed \$50,000 shall be reviewed and approved prior to award by the reviewing official designated in PHS 304.7101(c).

(c) *Reviewing officials.* For PHS agency contract awards expected to exceed the dollar amounts stated in this paragraph, the reviewing official indicated will personally approve the award. Other than these specified requirements for the designated reviewing official, PHS agencies may assign other review and approval responsibilities at their discretion. The following officials shall be responsible for preaward contract review and approval of all proposed contracts and modifications which are expected to exceed the dollar limits expressed below:

## Appendix A—Public Health Services

PHS 304.7101

Review and approval required for contracts expected to exceed	PHS acquisition activity	Reviewing official
<b>Office of the Assistant Secretary for Health</b>		
\$300,000	Administrative Services Center, Office of Management .....	Director, Administrative Services Center.
<b>Alcohol, Drug Abuse and Mental Health Administration</b>		
300,000	National Institute on Drug Abuse .....	Director, Division of Grants and Contracts Management.
300,000	National Institute on Alcohol Abuse and Alcoholism .....	Do.
300,000	National Institute of Mental Health .....	Do.
300,000	St Elizabeths, Hospital, NIMH .....	Do.
50,000	Addiction Research Center .....	Do.
<b>Centers for Disease Control</b>		
300,000	Centers for Disease Control .....	Director, Procurement and Grants Office.
<b>Food and Drug Administration</b>		
300,000	Division of Contracts and Grants Management .....	Director, Division of Contracts and Grants Management.
300,000	National Center for Toxicological Research .....	Do.
<b>National Institutes of Health</b>		
1,500,000	National Cancer Institute .....	Director, Division of Contracts and Grants.
1,000,000	National Heart, Lung, and Blood Institute .....	Do.
<b>National Institutes of Environmental Health Sciences</b>		
1,000,000	Research and development awards .....	Do.
100,000	Other than research and development .....	Director, Division of Procurement.
750,000	National Institute of Child Health and Human Development .....	Director, Division of Contracts and Grants.
750,000	National Institute of Allergy and Infectious Diseases .....	Do.
500,000	National Institute of Neurological and Communicative Disorders and Stroke.	Do.
<b>National Library of Medicine</b>		
500,000	Research and development awards .....	Director, Division of Contracts and Grants.
250,000	Other than research and development .....	Director, Division of Procurement.
250,000	National Institute of Dental Research .....	Director, Division of Contracts and Grants.
250,000	National Institute of Arthritis, Metabolism and Digestive Diseases .....	Do.
750,000	Centralized procuring activity for all other National Institutes of Health Research Organizations.	Do.
250,000	Procurement Branch, Division of Procurement, ORS .....	Director, Division of Procurement.
<b>Health Resources and Services Administration</b>		
500,000	Awards made by Headquarters and the Indian Health Service .....	Director, Division of Grants and Procurement Management.
300,000	Awards made by other than Headquarters and the Indian Health Service	Do.

**PHS 304.7102**

**48 CFR Ch. 3 (10–1–97 Edition)**

[49 FR 36238, Sept. 14, 1984, as amended at 51 FR 20486, June 5, 1986]

**PHS 304.7102 Conduct of the review.**

(a) *General.* The reviewing official is not required to personally perform the review, but he or she is responsible for assuring that the reviewer is knowledgeable in the acquisition field and

has sufficient expertise to perform a comprehensive review and to make cogent recommendations to the reviewing official for actions exceeding the dollar amounts stated in this subpart. The reviewing official shall approve each proposed contract award that is reviewed.

## SUBCHAPTER B—ACQUISITION PLANNING

### PART PHS 305—PUBLICIZING CONTRACT ACTIONS

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

#### Subpart PHS 305.2—Synopsis of Proposed Contract Actions

##### **PHS 305.202 Exceptions.**

(b) A determination and finding has been executed by the Acting Assistant Secretary for Health after concurrence by the Administrator of the Office of Federal Procurement Policy and the Administrator of the Small Business Administration, which exempts for the period September 30, 1985 through September 29, 1988, certain acquisitions with the National Academy of Sciences (NAS) from the synopsis requirements set forth in FAR 5.201. This exemption is applicable only to acquisitions where NAS is the only source which can provide the measure of expertise, independence, objectivity, and audience acceptance necessary to meet the program requirements. To ensure that this exemption will be used only when appropriate, the agency competition advocate shall certify, prior to award, each acquisition with NAS which is not synopsisized regardless of the dollar value. The certification must state that only NAS can provide the measure of expertise, independence, objectivity, and audience acceptance necessary to meet the program needs.

[51 FR 20487, June 5, 1986]

### PART PHS 306—COMPETITION REQUIREMENTS

#### Subpart PHS 306.3—Other Than Full and Open Competition

Sec.

PHS 306.304 Approval of the justification.

#### Subpart PHS 306.5—Competition Advocates

PHS 306.502 Duties and responsibilities.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 51 FR 20487, June 5, 1986, unless otherwise noted.

#### Subpart PHS 306.3—Other Than Full and Open Competition

##### **PHS 306.304 Approval of the justification.**

(a)(3) The Deputy Assistant Secretary for Health, Operations, PHS, is designated as the approving official referenced in FAR 6.304(a)(3) and 306.304(a)(3).

#### Subpart PHS 306.5—Competition Advocates

##### **PHS 306.502 Duties and responsibilities**

(b) The competition advocates for the PHS activities shall coordinate their efforts with the PHS competition advocate, the Deputy Assistant Secretary for Health Operations.

## SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

### PART PHS 314—FORMAL ADVERTISING

#### Subpart PHS 314.4—Opening of Bids and Award of Contract

Sec.

PHS 314.406-3 Other mistakes disclosed before award.

PHS 314.406-4 Mistakes after award.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

#### Subpart PHS 314.4—Opening of Bids and Award of Contract

##### **PHS 314.406-3 Other mistakes disclosed before award.**

(g)(3) In addition to the requirement in 314.406-3(g)(3), a copy of the data required by FAR 14.406-3(g)(3) shall be sent to the Office of General Counsel, Business and Administrative Law Division, Parklawn Building, Room 17A-32, 5600 Fishers Lane, Rockville, MD 20857. An information copy of the contracting officer's written statement of facts and circumstances shall be provided to the Contracts Management Branch, DGC/ORM/OM/PHS.

[51 FR 20488, June 5, 1986]

##### **PHS 314.406-4 Mistakes after award.**

(e)(2) The data shall be submitted as prescribed in PHS 314.406-3(g)(3).

[51 FR 20488, June 5, 1986]

### PART PHS 315—CONTRACTING BY NEGOTIATION

#### Subpart PHS 315.4—Solicitation and Receipt of Proposals and Quotations

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

##### **PHS 315.412 Late proposals and modifications.**

(c)(1) When the principal official responsible for acquisition determines that certain classes of biomedical or behavioral research and development acquisitions should be subject to conditions other than those specified in FAR 52.215-10, Late Submissions, Modifications and Withdrawals of Proposals, he/she may authorize the use of the provision in PHS 352.215-10 in addition to the provision at FAR 52.215-10.

(2) When the provision in PHS 352.215-10 is included in the solicitation and a proposal is received after the exact time specified for receipt, the contracting officer, with the assistance of cost and technical personnel, shall make a written determination as to whether the proposal meets the requirements of the provision at PHS 352.215-10 and, therefore, can be considered.

[51 FR 43357, Dec. 2, 1986; 51 FR 45229, Dec. 17, 1987, as amended at 52 FR 44397, Nov. 19, 1987]

## SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

### PART PHS 323—ENVIRONMENT, CONSERVATION, AND OCCUPATIONAL SAFETY

#### Subpart PHS 323.70—Safety and Health

Sec.

PHS 323.7000 Scope of subpart.

PHS 323.7001 General.

PHS 323.7002 Policy.

PHS 323.7003 Actions required.

PHS 323.7004 Contract clause.

PHS 323.7005 Solicitation notice—construction.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 51 FR 20488, June 5, 1986, unless otherwise noted.

#### Subpart PHS 323.70—Safety and Health

##### PHS 323.7000 Scope of subpart.

This subpart prescribes the use of a safety and health clause in contracts involving hazardous material or operations, and procedures for developing and administering safety and health provisions.

##### PHS 323.7001 General.

Various statutes and regulations (e.g., Walsh-Healey Act; Service Contract Act) require adherence to minimum safety and health standards by contractors engaged in potentially hazardous work. Positive action to reduce accidents and conditions hazardous to health under all contracts is in the Government's interest since the cost of such accident and health hazards is borne by the Government through higher prices and sometimes by direct indemnification of contractors against liability claims.

##### PHS 323.7002 Policy.

(a) The guidance contained in FAR Subpart 23.3 shall be used for hazardous material as the primary reference. When that guidance is judged insufficient or does not meet the safety and health situation in the instant acquisition, this subpart shall be followed.

(b) Whenever the performance of a contract will require use of hazardous

materials or operations, the contracting activity shall require the prime contractor and subcontractors to:

(1) Provide protection for the life and health of PHS employees, contractor employees, other persons involved with work on PHS programs and projects, and the public;

(2) Avoid accidental work interruptions which could delay progress of PHS programs and project;

(3) Maintain controls for the prevention of damage and loss to property; and

(4) Accumulate and provide data necessary for analysis of risk and loss factors relating to PHS programs and projects.

##### PHS 323.7003 Actions required.

(a) *Contracting activities.* Contracting activities shall use the clause set forth in PHS 352.223-70 as a guide in developing appropriate safety and health clauses for use in prospective contracts involving the following:

(1) Services or products;

(2) Research, development, or test projects;

(3) Transportation of hazardous materials; and

(4) Construction, including construction of facilities on the contractor's premises.

(b) *Safety officers.* OPDIV safety officers shall advise and assist initiators of acquisition requests and contracting officers in:

(1) Determining whether safety and health provisions should be included in a prospective contract;

(2) Selecting or developing safety and health clause provisions for incorporation in a prospective contract;

(3) Evaluating a prospective contractor's safety and health programs; and

(4) Conducting post-award review and surveillance to the extent deemed necessary.

(c) *Initiators.* Initiators of acquisition requests for items described in paragraph (a) of this section shall:

(1) During the preparation of a request for contract, and in the RFP or IFB;

**PHS 323.7004**

**48 CFR Ch. 3 (10–1–97 Edition)**

(i) Ensure that hazardous materials and operations to be utilized in the performance of the contract are clearly identified; and

(ii) Coordinate with the appropriate safety officer to ensure that all hazardous materials and operations are evaluated and that adequate safety requirements are established in the RFP or IFB.

(2) During the period of performance:

(i) Apprise the contracting officer of any noncompliance with safety and health provisions identified in the contract; and

(ii) Cooperate with the safety officer in conducting review and surveillance activities.

**PHS 323.7004 Contract clause.**

All contracts which require the use of hazardous materials or operations shall include a clause to provide adherence to minimum safety and health standards. The clause set forth in PHS 352.223–70 may be used or appropriately modified to meet the needs of the individual contract.

**PHS 323.7005 Solicitation notice—construction.**

The contracting officer shall include the clause in PHS 352.223–71 in all solicitations and resultant contracts for construction and construction services.

## SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

### PART PHS 333—PROTESTS, DISPUTES, AND APPEALS

#### Subpart PHS 333.1—Protests

Sec.

PHS 333.102 General.

PHS 333.104 Protests to GAO.

PHS 333.105 Protests to GSBCA.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 51 FR 20488, June 5, 1986, unless otherwise noted.

#### Subpart PHS 333.1—Protests

##### **PHS 333.102 General.**

The Division of Grants and Contracts (DGC), ORM/OM/PHS, will participate directly in the resolution of protests against PHS agencies when the Office of the Secretary, HHS, requests DGC involvement, or when DGC considers a protest action to be sensitive or controversial, or otherwise has an interest in the protest. In cases where DGC will participate, the cognizant PHS contracting office shall be notified. In those instances, all file materials and written statements normally forwarded directly to the Departmental Protest Control Officer shall be forwarded to DGC, ORM/OM/PHS.

##### **PHS 333.104 Protests to GAO.**

(a) *General.* (2) A copy of the protest files shall be sent to the Office of General Counsel, Business and Administrative Law Division (OGC-BAL), Park-

lawn Building, Room 17A-32, 5600 Fishers Lane, Rockville, MD 20857. In addition, an information copy of the contracting officer's statement of facts required by 333.104(a)(2)(i) shall be sent to the Contracts Management Branch, DGC/ORM/OM/PHS.

(b) *Protests before award.* (1) The head of the contracting activity authority to approve the written finding required by FAR 33.104(b)(1) to authorize a contract award while a protest is pending, may be delegated to an organizational level no lower than the Executive Officer of each PHS Agency.

(4) The data shall be submitted as prescribed in PHS 333.104(a)(2).

(c) *Protests after award.* (1) The data shall be submitted as prescribed in PHS 333.104(a)(2).

(2) The head of the contracting activity authority to authorize contract performance notwithstanding a protest as set forth in FAR 33.104(c)(2), may be delegated to an organizational level no lower than the Executive Officer of each PHS Agency.

##### **PHS 333.105 Protests to GSBCA.**

(b) The copy of the protest file to be sent to OGC-BAL shall be sent to OGC-BAL, Parklawn Building, Room 17A-32, 5600 Fishers Lane, Rockville, MD 20857. In addition, an information copy of the contracting officer's statement of facts required by 333.105(b)(1) shall be sent to the Contracts Management Branch, DGC/ORM/OM/PHS.

## SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

### PART PHS 335—RESEARCH AND DEVELOPMENT CONTRACTING

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

#### **PHS 335.080 Special determinations and findings affecting research and development contracting.**

The Assistant Secretary for Health shall sign individual and class determinations and findings for:

(a) Acquisition or construction of equipment or facilities on property not owned by the United States pursuant to 42 U.S.C. 241(a)(7); and

(b) Use of an indemnification provision in a research contract pursuant to 42 U.S.C. 241(a)(7).

[51 FR 20489, June 5, 1986]

### PART PHS 336—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

#### **Subpart PHS 336.6—Architect-Engineer Services**

Sec.

PHS 336.680 Program of Requirements approval.

PHS 336.681 Funding.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 51 FR 20489, June 5, 1986, unless otherwise noted.

#### **Subpart PHS 336.6—Architect-Engineer Services**

##### **PHS 336.680 Program of Requirements approval.**

The programmatic and technical requirements for PHS design projects are established in a special document known as a Program of Requirements (POR). In the case of design projects involving the construction of new space, including new facilities, replacement facilities, and building additions, the contracting officer shall ensure that the Office of the Assistant Secretary for Health has approved, or waived approval of, a POR prior to the issuance of the synopsis or solicitation for architectural/engineering services.

##### **PHS 336.681 Funding.**

(a) The contracting officer shall ensure that the agency financial management officer has identified and certified that design funds have been appropriated and apportioned prior to the release of a synopsis or solicitation for architect-engineer services for the types of acquisitions specified in PHS 336.680. New facilities, replacement facilities, and building additions must only be acquired with funds appropriated for that specific project as evidenced by either (1) specific language in an appropriations act, or (2) Congressional appropriations intent as reflected in appropriations committee reports or Congressional budget justification.

(b) In the case of ADAMHA, FDA, HRSA, and NIH, the referenced agency financial management officer is the Director of the agency's Division of Financial Management. In the case of CDC, this official is the Director of the Financial Management Office. Subject to HRSA concurrence, funding for projects of the Indian Health Service/HRSA may be certified by the designated financial management officer within the IHS Office of Administration.

(c) The funding source certification shall include identification of the title, appropriation symbol, and fiscal year of the appropriation plus any relevant project or activity description in the appropriation act or reports.

(d) In an unusual circumstance where time is critical, a synopsis or solicitation for architect-engineer services may be issued after the POR has been approved if the agency financial management officer certifies that appropriation and apportionment of proper funds as set forth in paragraph (a) above are expected within 60 days. In such cases, the synopsis or solicitation must specify that award is subject to the availability of funds. In these circumstances the contracting officer shall ensure that contract award is not made until the agency financial management officer has certified in writing

## **Appendix A—Public Health Services**

**PHS 336.681**

that proper funds have been appropriated and apportioned. Other exceptions to the funding requirements set forth in paragraph (a) above, must be specifically approved in writing by the

Office of the Assistant Secretary for Health prior to the release of a synopsis or solicitation for architect-engineer services for new facilities, replacement facilities, and building additions.

## SUBCHAPTER H—CLAUSES AND FORMS

### PART PHS 352—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

#### Subpart PHS 352.2—Texts of Provisions and Clauses

Sec.

PHS 352.215-10 Late proposals, modifications of proposals, and withdrawals of proposals.

PHS 352.223-70 Safety and health.

PHS 352.223-71 Safety and health—construction.

PHS 352.232-70 Additional payment provision.

PHS 352.280-1 Protection of human subjects.

PHS 352.280-2 Care of laboratory animals.

PHS 352.280-3 Maximum allowable cost for drugs.

PHS 352.280-4 Contracts awarded under the Indian Self-Determination Act.

PHS 352.280-6 Demurrage charge provisions for reusable cylinders and containers.

#### Subpart PHS 352.3—Provision and Clause Matrices

PHS 352.380-4 Contract clauses for contracts awarded under the Indian Self-Determination Act.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 36242, Sept. 14, 1984, unless otherwise noted.

#### Subpart 352.2—Texts of Provisions and Clauses

##### **PHS 352.215-10 Late proposals, modifications of proposals, and withdrawals of proposals.**

As prescribed in PHS 315.412, the following provision may be included in the solicitation when authorized by the principal official responsible for acquisition.

LATE PROPOSALS, MODIFICATIONS OF PROPOSALS, AND WITHDRAWALS OF PROPOSALS (NOV 1986)

Notwithstanding the procedures contained in the provision of this solicitation entitled Late Submissions, Modifications, and Withdrawals of Proposals, a proposal received after the date specified for receipt may be considered if it offers significant cost or technical advantages to the Government, and it was received before proposals were dis-

tributed for evaluation, or within five calendar days after the exact time specified for receipt, whichever is earlier.

(End of provision)

[51 FR 43357, Dec. 2, 1986; 51 FR 45229, Dec. 17, 1987, and 52 FR 44357, Nov. 19, 1987]

##### **PHS 352.223-70 Safety and health.**

The following clause is covered by the policy set forth in Subpart PHS 323.70 and is to be used in accordance with the instructions set forth in PHS 323.7002 and PHS 323.7003.

##### SAFETY AND HEALTH (APR 1984)

(a) In order to provide safety controls for protection to the life and health of employees and other persons; for prevention of damage to all property; and for avoidance of work interruptions in the performance of the contract; the Contractor will comply with the following standards: (Insert codes, standards, and criteria (including any applicable State and local requirements) prescribed by the Safety Officer.)

Further, the Contractor shall take or cause to be taken such additional safety measures as the Contracting Officer may determine to be reasonably necessary; *Provided*, that, if compliance with such additional safety measures results in a material increase in the cost or time of performance of the contract, an equitable adjustment will be made in accordance with the clause of this contract entitled "Changes."

(b) Prior to commencement of work, the Contractor will submit in writing its plan for complying with the safety and health provisions of this contract, and will meet with the Contracting Officer or his/her designated representative to discuss and develop a mutual understanding relative to administration of the overall safety program.

(c) During the performance of work under this contract, the Contractor shall comply with all procedures prescribed by the Contracting Officer for the control and safety of persons visiting the job site and will comply with such requirements to prevent accidents as may be prescribed by the Contracting Officer.

(d) The Contractor will maintain an accurate record of, and report to the Contracting Officer in such manner as the Contracting Officer may prescribe, all accidents and incidents resulting in death, traumatic injury, occupational disease, and/or damage to all property incident to work performed under the contract.

## Appendix A—Public Health Services

## PHS 352.280-1

(e) The Contracting Officer shall notify (if otherwise, confirm in writing) the Contractor of any noncompliance with the provisions of this clause and corrective action to be taken. After receipt of such notice, the Contractor shall immediately take such corrective action. (Such notice, when delivered to the Contractor or its representative at the site of the work, shall be deemed sufficient for the purpose.) If the Contractor fails or refuses to comply promptly, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken. No part of the time lost due to any such stop order shall be the subject of claim for extension of time or for costs or damages by the Contractor.

(f) The Contractor shall insert the substance of this clause in each subcontract involving the use of hazardous materials or operations. Compliance with the provisions of this clause by subcontractors will be the responsibility of the Contractor.

(End of clause)

[51 FR 20489, June 5, 1986]

### **PHS 352.223-71 Safety and health—construction.**

The following clause shall be included in all solicitations and resultant contracts for construction and construction services, as required by PHS 323.7005.

SAFETY AND HEALTH—CONSTRUCTION (APR 1984)

Your attention is invited to the regulations issued by the Secretary of Labor pursuant to section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333) entitled "Safety and Health Regulations for Construction" (29 CFR Part 1926). The Contractor is required to comply with the referenced regulations to the extent that the resultant contract involves construction.

(End of clause)

[51 FR 20490, June 5, 1986]

### **PHS 352.232-70 Additional payment provision.**

The following clause shall be included in all solicitations and resultant contracts for construction which contain the "Payments Under Fixed-Price Construction Contracts" clause set forth in FAR 52.232-4:

ADDITIONAL PAYMENT PROVISION (APR 1984)

Unless otherwise stated in this contract, there will be taken into consideration in computing progress payments material that

will be incorporated into the structure if such material is delivered at the site, or is delivered to the Contractor and properly stored by it in a suitable warehouse, storage yard, or similar place either within 25 miles of the site or as otherwise approved by the Contracting Officer. Before each payment is made, the Contractor shall furnish to the Contracting Officer such evidence as he/she may require of the quantity and value of such material and that it will be incorporated into the structure. If such material is stored off the site, the Contractor shall also furnish to the Contracting Officer, before payment, properly executed bills of sale to the Government for the delivered material upon which such payment is to be made.

(End of clause)

[51 FR 20490, June 5, 1986]

### **PHS 352.280-1 Protection of human subjects.**

The policy and procedures to be followed whenever individuals may be involved as subjects in research activities supported or conducted by the Department under a contract are provided in Subpart PHS 380.1 and 45 CFR Part 46, Protection of Human Subjects.

(a) The following provisions shall be included in solicitations expected to involve human subjects:

NOTICE TO OFFERORS OF REQUIREMENTS OF 45 CFR PART 46, PROTECTION OF HUMAN SUBJECTS (SEP 1985)

(a) Copies of the Department of Health and Human Services (Department) regulations for the protection of human subjects, 45 CFR Part 46, are available from the Office for Protection from Research Risks (OPRR), National Institutes of Health, Bethesda, Maryland 20892. The regulations provide a systematic means, based on established ethical principles, to safeguard the rights and welfare of individuals who participate as subjects in research activities supported or conducted by the Department.

(b) The regulations define a human subject as a living individual about whom an investigator (whether professional or student) conducting research obtains (1) data through intervention of interaction with the individual, or (2) identifiable private information. The regulations extend to the use of human organs, tissue, and body fluids from individually identifiable human subjects as well as to graphic, written, or recorded information derived from individually identifiable human subjects. The use of autopsy materials is governed by applicable State and local law and is not directly regulated by 45 CFR Part 46.

(c) Activities in which the only involvement of human subjects will be in one or more of the categories set forth in 45 CFR 46.101(b)(1-6) are exempt from coverage.

(d) Inappropriate designations of the non-involvement of human subjects or of exempt categories of research in a project may result in delays in the review of a proposal. The Public Health Service will make a final determination of whether the proposed activities are covered by the regulations or are in an exempt category, based on the information provided in the proposal. In doubtful cases, *prior consultation with OPRR, (telephone: 301-496-7014), is recommended.*

(e) In accordance with 45 CFR Part 46, prospective Contractors being considered for award shall be required to file with OPRR an acceptable Assurance of Compliance with the regulations, specifying review procedures and assigning responsibilities for the protection of human subjects. The initial and continuing review of a research project by an institutional review board shall assure that the rights and welfare of the human subjects involved are adequately protected, that the risks to the subjects are reasonable in relation to the potential benefits, if any, to the subjects and the importance of the knowledge to be gained, and that informed consent will be obtained by methods that are adequate and appropriate. Prospective Contractors proposing research that involves human subjects shall be contacted by OPRR and given detailed instructions for establishing an institutional review board and filing an Assurance of Compliance.

(f) It is recommended that OPRR be consulted for advice or guidance concerning either regulatory requirements or ethical issues pertaining to research involving human subjects.

(End of provision)

(b) The following clause shall be included in contracts involving human subjects:

**PROTECTION OF HUMAN SUBJECTS (OCT 1986)**

(a) The Contractor agrees that the rights and welfare of human subjects involved in research under this contract shall be protected in accordance with 45 CFR Part 46 and with the Contractor's current Assurance of Compliance on file with the Office for Protection from Research Risks, National Institutes of Health, Public Health Service. The Contractor further agrees to provide certification at least annually that the institutional review board has reviewed and approved the procedures which involve human subjects in accordance with 45 CFR Part 46 and the Assurance of Compliance.

(b) The Contractor shall bear full responsibility for the performance of all work and services involving the use of human subjects

under this contract in a proper manner and as safely as is feasible. The parties hereto agree that the Contractor retains the right to control and direct the performance of all work under this contract. Nothing in this contract shall be deemed to constitute the Contractor or any subcontractor, agent or employee of the Contractor, or any other person, organization, institution, or group of any kind whatsoever, as the agency or employee of the Government. The Contractor agrees that it has entered into this contract and will discharge its obligations, duties, and undertakings and the work pursuant thereto, whether requiring professional judgement or otherwise, as an independent Contractor without imputing liability on the part of the Government for the acts of the Contractor or its employees.

(c) If at any time during performance of this contract, the Contracting Officer determines, in consultation with the Office for Protection from Research Risks (OPRR), National Institutes of Health (NIH), that the Contractor is not in compliance with any of the requirements and/or standards stated in paragraphs (a) and (b), above, the Contracting Officer may immediately suspend, in whole or in part, work and further payments under this contract until the Contractor corrects such noncompliance. Notice of the suspension may be communicated by telephone and confirmed in writing. If the Contractor fails to complete the corrective action within the period of time designated in the Contracting Officer's written notice of suspension, the Contracting Officer may, in consultation with OPRR, NIH, terminate this contract in whole or in part, and the Contractor's name may be removed from the list of those Contractors with approved Department of Health and Human Services Human Subject Assurances.

(End of clause)

[51 FR 20490, June 5, 1986, as amended at 52 FR 9300, Mar. 24, 1987]

**PHS 352.280-2 Care of laboratory animals.**

The policies and procedures to be used when contracts involve live vertebrate animals are provided in Subpart PHS 380.2, and in the *PHS Policy on Humane Care and Use of Laboratory Animals by Awardee Institutions* and accompanying implementation instructions published in a special edition of the *NIH Guide for Grants and Contracts*, Vol. 14, No. 8, June 25, 1985.

(a) The following provision shall be included in solicitations expected to involve vertebrate animals:

## Appendix A—Public Health Services

PHS 352.280-3

### NOTICE TO OFFERORS OF REQUIREMENT FOR ADEQUATE ASSURANCE OF PROTECTION OF VERTEBRATE ANIMAL SUBJECTS (SEP 1985)

The *PHS Policy on Humane Care and Use of Laboratory Animals by Awardee Institutions* establishes a number of requirements for research activities involving animals. Before a PHS award may be made to an applicant organization, the organization shall file, with the Office for Protection from Research Risks (OPRR), National Institutes of Health (NIH), PHS, a written Animal Welfare Assurance which commits the organization to comply with the provisions of the *PHS Policy on Humane Care and Use of Laboratory Animals by Awardee Institutions*, the Animal Welfare Act, and the *Guide for the Care and Use of Laboratory Animals* prepared by the Institute of Laboratory Animal Resources. In accordance with the *PHS Policy on Humane Care and Use of Laboratory Animals by Awardee Institutions*, applicant organizations must establish a committee, qualified through the experience and expertise of its members, to oversee the institution's animal program, facilities and procedures. No PHS award involving the use of animals shall be made unless the Animal Welfare Assurance has been approved by OPRR. Prior to award, the contracting officer will notify Contractor(s) selected for projects that involve live vertebrate animals that an Animal Welfare Assurance is required. The contracting officer will request that OPRR negotiate an acceptable Animal Welfare Assurance with those Contractor(s). *For further information, OPRR may be contacted at NIH, Bethesda, Maryland 20892 (301-496-7041).*

(End of provision)

(b) The following clause shall be included in all contracts involving research on vertebrate animals:

#### CARE OF LIVE VERTEBRATE ANIMALS (OCT 1986)

(a) Before undertaking performance of any contract involving research on live vertebrate animals, the Contractor shall register with the Secretary of Agriculture of the United States in accordance with 7 U.S.C. 2316 and 9 CFR 2.25-2.28. The Contractor shall furnish evidence of such registration to the Contracting Officer.

(b) The Contractor shall acquire vertebrate animals used in research from a dealer licensed by the Secretary of Agriculture under 7 U.S.C. 2133 and 9 CFR 2.1-2.11, or from a source that is exempt from licensing under those sections.

(c) The Contractor agrees that the care and use of any live vertebrate animals used or intended for use in the performance of this contract will conform with the *PHS Policy on Humane Care and Use of Laboratory Animals*

by *Awardee Institutions*, the current Animal Welfare Assurance, the *Guide for the Care and Use of Laboratory Animals* prepared by the Institute of Laboratory Animal Resources and the pertinent laws and regulations of the United States Department of Agriculture (see 7 U.S.C. 2131 *et seq.* and 9 CFR Subchapter A, Parts 1-4). In case of conflict between standards, the more stringent standard shall be used.

(d) If at any time during performance of this contract, the Contracting Officer determines, in consultation with the Office for Protection from Research Risks (OPRR), National Institutes of Health (NIH), that the Contractor is not in compliance with any of the requirements and/or standards stated in paragraphs (a) and (c), above, the Contracting Officer may immediately suspend, in whole or in part, work and further payments under this contract until the Contractor corrects such noncompliance. Notice of the suspension may be communicated by telephone and confirmed in writing. If the Contractor fails to complete corrective action within the period of time designated in the Contracting Officer's written notice of suspension, the Contracting Officer may, in consultation with OPRR, NIH, terminate this contract in whole or in part, and the Contractor's name may be removed from the list of those Contractors with approved Public Health Service Animal Welfare Assurances.

NOTE: The Contractor may request registration of its facility and a current listing of licensed dealers from the Regional Office of the Animal and Plant Health Inspection Service (APHIS), USDA, for the region in which its research facility is located. The location of the appropriate APHIS Regional Office, as well as information concerning this program may be obtained by contacting the Senior Staff Officer, Animal Care Staff, USDA/APHIS, Federal Center Building, Hyattsville, Maryland 20782.

(End of clause)

[51 FR 20491, June 5, 1986, as amended at 52 FR 9300, Mar. 24, 1987]

### PHS 352.280-3 Maximum allowable cost for drugs.

The following clause, or one reading substantially as follows, shall be included in all contracts subject to the provisions of the Maximum Allowable Cost (MAC) regulation and PHS 380.305.

#### MAXIMUM ALLOWABLE COST FOR DRUGS (APR 1984)

(a) Reimbursement for drugs provided or used under this contract shall be in accordance with the Maximum Allowable Cost

(MAC) regulation set forth in 45 CFR Subtitle A, Part 19. In accordance with 19.3 of the MAC regulation, the amount which is recognized for reimbursement or payment purposes for any drug purchased under the terms of the contract shall not exceed the lowest of:

(1) The maximum allowable cost of the drug, if any, established in accordance with 19.5 of the MAC regulation plus a reasonable dispensing fee;

(2) The acquisition cost of the drug plus a reasonable dispensing fee; or

(3) The provider's usual and customary charge to the public for the drug; *Provided, That:*

(i) The maximum allowable cost established for any drug shall not apply to a brand of that drug prescribed for a patient which the prescriber has certified in his/her own handwriting is medically necessary for that patient; and *Provided, further, That:*

(ii) When compensation for drug dispensing is included in some other amount payable to the provider by the reimbursing or payment program agency, a separate dispensing fee will not be recognized.

(b) The Contractor agrees:

(1) To include the following solicitation notification in all applicable solicitations issued under this contract and to ensure that subcontractors include it in any subsequent applicable solicitation:

This acquisition is subject to the Maximum Allowable Cost (MAC) regulation set forth in Part 19 to Subtitle A of Title 45 of the Code of Federal Regulations.

(2) To include this clause, including this paragraph (b), in all applicable subcontracts, regardless of tier, awarded pursuant to this contract.

(3) To include the furnished MAC determination or acquisition cost data in all applicable solicitations issued under this contract and in all resultant subcontracts awarded pursuant to this contract.

(End of clause)

**PHS 352.280-4 Contracts Awarded Under the Indian Self-Determination Act.**

(a) Insert the following clauses in cost-reimbursement contracts awarded under the Indian Self-Determination Act as described in subpart PHS 380.4.

**CLAUSE NO. 1—DEFINITIONS (JUNE 1977)**

As used throughout this contract, the following terms shall have the meaning set forth below:

(a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department of Health and Human Services (HHS); and the term "his/her duly authorized representative"

means any person, persons, or board (other than the Contracting Officer) authorized to act for the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or employee who is properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of the Contracting Officer acting within the limits of his/her authority.

(c) The term "Project Officer" means the person representing the Government for the purpose of monitoring contract performance. The Project Officer is not authorized to issue any instructions or directions which effect any increase or decrease in the cost of this contract or which change the period of this contract.

(d) The term "Department" means the Department of Health and Human Services.

(e) Except as otherwise provided in this contract, the term "subcontract" includes purchase orders under this contract.

(End of clause)

**CLAUSE NO. 2—DISPUTES (JUNE 1977)**

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his/her decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his/her duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: *Provided, That* nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

## Appendix A—Public Health Services

PHS 352.280-4

(End of clause)

### CLAUSE NO. 3—LIMITATION OF COST (JUNE 1977)

(a) It is estimated that the total cost to the Government for the performance of this contract will not exceed the estimated cost set forth in this contract and the Contractor agrees to use its best efforts to perform all work and all obligations under this contract within such estimated costs. If at any time the Contractor has reason to believe that the costs which it expects to incur in the performance of this contract in the next succeeding sixty (60) days, when added to all costs previously incurred, will exceed seventy-five percent (75%) of the estimated cost set forth in the contract, or, if at any time the Contractor has reason to believe that the total cost to the Government, for the performance of this contract, will be substantially greater or less than the estimated cost thereof, the Contractor shall notify the Contracting Officer in writing to that effect, giving its revised estimate of such total cost for the performance of this contract.

(b) The Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated cost set forth in the contract and the Contractor shall not be obligated to continue performance under the contract or to incur costs in excess of such estimated cost unless and until the Contracting Officer shall have notified the Contractor in writing that such estimated cost has been increased and shall have specified in such notice a revised estimated cost which shall thereupon constitute the estimated cost of performance of this contract. When and to the extent that the estimated cost set forth in this contract has been increased by the Contracting Officer in writing, any costs incurred by the Contractor in excess of such estimated cost prior to the increase in estimated cost shall be allowable to the same extent as if such costs had been incurred after such increase in estimated cost.

(End of clause)

### CLAUSE NO. 4—ALLOWABLE COST (JUNE 1977)

(a) *Compensation for Contractor's performance.* Payment for the allowable cost, as herein defined and as actually incurred by the Contractor shall constitute full and complete compensation for the performance of the work under this contract.

(b) *Allowable cost.* The allowable cost of performing the work under this contract shall be the cost actually incurred by the Contractor, either directly incident or properly allocable to the contract, in the performance of this contract in accordance with its terms. The allowable cost, direct and indirect, including acceptability of cost allocation methods, shall be determined by the Contracting Officer in accordance with:

(1)(i) "A Guide for Nonprofit Institutions Establishing Indirect Cost Rates for Research Grants and Contracts with the Department of Health and Human Services, HHS Publication OASC-5" or (ii) "A Guide for Hospitals, Grants and Contracts with the Department of Health and Human Services, HHS Publication OASC-3," or (iii) Subpart 1-15.7 of the Federal Procurement Regulations (41 CFR Subpart 1-15.7) if the contract is with a state or local government agency, or (iv) Subpart 1-15.4 of the Federal Procurement Regulations (41 CFR Subpart 1-15.4) if the contract is for the procurement of construction or architect-engineer services.

(2) The terms of the contract.

(End of clause)

### CLAUSE NO. 5—NEGOTIATED OVERHEAD RATES (JUNE 1977)

(a) Notwithstanding the provisions of the clause of this contract entitled, "Allowable Cost," the allowable indirect costs shall be obtained by applying negotiated overhead rates to bases agreed upon by the parties, as specified below.

(b) The Contractor, as soon as possible, but not later than six (6) months after the expiration of each of the Contractor's financial years or such period as may mutually be agreed upon by the Government and the Contractor, shall submit to the Contracting Officer, with a copy to the cognizant audit agency, a proposed final overhead rate or rates for that period based on the Contractor's cost experience during that period, together with supporting cost data. Negotiation of final overhead rates by the Contractor and the Contracting Officer shall be undertaken as promptly as practicable after receipt of the Contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with the applicable cost principles set forth in paragraph (b)(1) of Clause 4, as in effect on the date of this contract, and the same hereby incorporated herein by reference.

(d) The results of each negotiation shall be set forth in an amendment to this contract, which shall specify (1) the agreed final rate, (2) the bases to which the rates apply, and (3) the periods for which the rates apply.

(e) Pending establishment of final overhead rates for any period, the Contractor shall be reimbursed either at negotiated provisional rates as provided in this contract or at billing rates acceptable to the Contracting Officer, subject to appropriate adjustment when the final rates for that period are established. To prevent substantial over or under payment, the provisional or billing rates may, at the request of either party, be revised by mutual agreement, either retroactively or prospectively. Any such revision of negotiated provisional rates provided in

this contract shall be set forth in an amendment to this contract.

(f) Any failure by the parties to agree on any final rate or rates under this clause shall be considered a dispute concerning a question of fact for decision by the Contracting Officer within the meaning of the clause of this contract entitled "Disputes."

(g) Submission of proposed provisional and/or final overhead rates, together with appropriate data in support thereof, to the Secretary or his/her duly authorized representative, and agreements on provisional and/or final overhead rates entered into between the Contractor and the Secretary or his/her duly authorized representative, as evidenced by Negotiated Overhead Rate Agreements signed by both parties, shall be deemed to satisfy the requirements of (b), (d) and (e) above.

(End of clause)

#### CLAUSE NO. 6—PAYMENT (JUNE 1977)

(a) *Payment on account of allowable cost.* Once each month (or at more frequent intervals if approved by the Contracting Officer) the Contractor may submit to the Contracting Officer, in such form and reasonable detail as may be required, an invoice or voucher supported by a statement of costs incurred by the Contractor in the performance of this contract and claimed to constitute allowable costs. Promptly after receipt of each invoice or voucher, the Government shall, subject to the provisions of (b) below, make payment thereon as approved by the Contracting Officer.

(b) *Audit Adjustments.* At any time or times prior to settlement under this contract the Contracting Officer may have invoices or vouchers and statements of cost audited. Each payment theretofore made shall be subject to reduction for amounts included in the related invoice or voucher which are found by the Contracting Officer, on the basis of such audit, not to constitute allowable cost. Any payment may be reduced for overpayment, or increased for underpayments on preceding invoices or vouchers.

(c) *Completion voucher.* On receipt and approval of the invoice or voucher designated by the Contractor as the "completion invoice" or "Completion Voucher" and upon compliance by the Contractor with all the provisions of this contract (including without limitation, the provisions relating to patents and provisions of (d) below) the Government shall promptly pay to the Contractor any balance of allowable cost. The completion invoice or voucher shall be submitted by the Contractor promptly following completion of the work under this contract but in no event later than 6 months (or such longer period as the Contracting Officer may in his/her discretion approve in writing) from the date of such completion.

(d) *Applicable credits.* The Contractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government, to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract. Reasonable expenses incurred by the Contractor for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable cost hereunder when approved by the Contracting Officer.

(e) *Financial settlement.* Prior to final payment under this contract, the Contractor and each assignee under this contract whose assignment is in effect at the time of final payment under this contract shall execute and deliver:

(1) An assignment to the Government in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including any interest thereon) properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract, and

(2) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions:

(i) Specified claims in stated amounts or in estimated amounts where the amounts are susceptible to exact statement by the Contractor;

(ii) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the Contractor to third parties arising out of the performance of this contract; Provided, That such claims are not known to the Contractor on the date of the execution of the release; And provided further, That the Contractor gives notice of such claims in writing to the Contracting Officer not more than 6 years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier; and

(iii) Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of this contract relating to patents.

(End of clause)

#### CLAUSE NO. 7—ADVANCE PAYMENTS (JUNE 1977)

(a) *Amount of Advance.* At the request of the Contractor, and subject to the conditions hereinafter set forth, the Government shall make an advance payment, or advance payments from time to time, to the Contractor. No advance payment shall be made (1) without the approval of the office administering

advance payments (hereinafter called the "Administering Office" and designated in paragraph (k)(4) as with all advance payments theretofore made, shall exceed the amount stated in paragraph (k)(1) hereof; and (3) without a properly certified invoice or invoices.

(b) *Special Bank Account.* Until all advance payments made hereunder are liquidated and the Administering Office approves in writing the release of any funds due and payable to the Contractor, all advance payments and all other payments under the contract shall be made by check payable to the Contractor, and be marked for deposit only in a Special Bank Account with the bank designated in paragraph (k)(2) hereof. No part of the funds in the Special Bank Account shall be mingled with other funds of the Contractor prior to withdrawal thereof from the Special Bank Account as hereinafter provided. Except as hereinafter provided, each withdrawal shall be made only by check of the Contractor countersigned on behalf of the Government by the Contracting Officer or such other person or persons as he/she may designate in writing (hereinafter called the "Countersigning Agent"). Until otherwise determined by the Administering Office, countersignature on behalf of the Government will not be required.

(c) *Use of Funds.* The funds in the Special Bank Account may be withdrawn by the Contractor solely for the purposes of making payments for items of allowable cost or to reimburse the Contractor for such items of allowable cost, and for such other purposes as the Administering Office may approve in writing. An interpretation required as to the proper use of funds shall be made in writing by the Administering Office.

(d) *Return of Funds.* The Contractor may at any time repay all or any part of the funds advanced hereunder. Whenever so requested in writing by the Administering Office, the Contractor shall repay to the Government such part of the unliquidated balance of advance payments as shall in the opinion of the Administering Office be in excess of current requirements, or (when added to total advance previously made and liquidated) in excess of the amount specified in paragraph (k)(1) hereof. In the event the Contractor fails to repay such part of the unliquidated balance of advance payments when so requested by the Administering Office, all or any part thereof may be withdrawn from the Special Bank Account by checks payable to the Treasurer of the United States signed solely by the Countersigning Agent and applied in reduction of advance payments then outstanding hereunder.

(e) *Liquidation.* If not otherwise liquidated, the advance payments made hereunder shall be liquidated as herein provided. When the sum of all payments under this contract, other than advance payments, plus the un-

liquidated amount of advance payments are equal to the total estimated cost for the work under this contract or such lesser amount to which the total estimated cost under this contract may have been reduced, plus increases, if any, in this total estimated cost not exceeding, in the aggregate (including, without limitation, reimbursable costs incident to termination for cause and retrocession as estimated by the Contracting Officer), the Government shall thereafter withhold further payments to the Contractor and apply the amounts withheld against the Contractor's obligation to repay such advance payments until such advance payments shall have been fully liquidated. If upon completion, termination, or retrocession of the contract all advance payments have not been fully liquidated, the balances therefor shall be deducted from any sums otherwise due or which may become due to the Contractor from the Government, and any deficiency shall be paid by the Contractor to the Government upon demand.

(f) *Bank Agreement.* Before an advance payment is made hereunder, the Contractor shall transmit to the Administering Office, in the form prescribed by such office, an Agreement in triplicate from the bank in which the Special Bank Account is established, clearly setting forth the special character of the account and the responsibilities of the bank thereunder. Wherever possible, such bank shall be a member bank of the Federal Reserve System, or an "insured" bank within the meaning of the Act creating the Federal Deposit Insurance Corporation Act of August 23, 1935, 49 Stat. 685, as amended (12 U.S.C. 264).

(g) *Lien on Special Bank Account.* The Government shall have a lien upon any balance in the Special Bank Account paramount to all other liens, which lien shall secure the repayment of any advance payments made hereunder.

(h) *Lien on Property Under Contract.* Any and all advance payments made under this contract shall be secured, when made, by a lien in favor of the Government, paramount to all other liens, upon the supplies or other things covered by this contract and on all material and other property acquired for or allocated to the performance of this contract, except to the extent that the Government by virtue of any other provision of this contract, or otherwise, shall have valid title to such supplies, materials, or other property as against other creditors of the Contractor. The Contractor shall identify, by marking or segregation, all property which is subject to a lien in favor of the Government by virtue of any provision of this contract in such a way as to indicate that it is subject to such lien and that it has been acquired for or allocated to the performance of this contract. If for any reason such supplies,

materials, or other property are not identified by marking or segregation, the Government shall be deemed to have a lien to the extent of the Government's interest under this contract on any mass of property with which such supplies, materials, or other property are commingled. The Contractor shall maintain adequate accounting control over such property on its books and records. If at any time during the progress of the work on the contract it becomes necessary to deliver any item or items and materials upon which the Government has a lien as aforesaid to a third person, the Contractor shall notify such third person of the lien herein provided and shall obtain from such third person a receipt, in duplicate, acknowledging, inter alia, the existence of such lien. A copy of each receipt shall be delivered by the Contractor to the Contracting Officer. If this contract is terminated in whole or in part and the Contractor is authorized to sell or retain termination inventory acquired for or allocated to this contract, such sale or retention shall be made only if approved by the Contracting Officer, which approval shall constitute a release to the Government's lien hereunder to the extent that such termination inventory is sold or retained, and to the extent that the proceeds of the sale, or the credit allowed for such retention on the Contractor's termination claim, is applied in reduction of advance payments then outstanding hereunder.

(i) *Insurance.* The Contractor represents and warrants that it is now maintaining with responsible insurance carriers, (1) insurance upon its own plant and equipment against fire and other hazards to the extent that like properties are usually insured by others operating plants and properties of similar character in the same general locality; (2) adequate insurance against liability on account of damage to persons or property; and (3) adequate insurance under all applicable workmen's compensation laws. The Contractor agrees that, until work under this contract has been completed and all advance payments made hereunder have been liquidated, it will (i) maintain such insurance; (ii) maintain adequate insurance upon any materials, parts, assemblies, subassemblies, supplies, equipment and other property acquired for or allocable to this contract and subject to the Government lien hereunder; and (iii) furnish such certificates with respect to its insurance as the Administering Office may from time to time require.

(j) *Prohibition Against Assignment.* Notwithstanding any other provision of this contract, the Contractor shall not transfer, pledge, or otherwise assign this contract, or any interest therein, or any claim arising thereunder, to any party or parties, bank, trust company, or other financing institution.

(k) *Designations and Determinations.* (1) *Amount.* The amount of advance payments at any time outstanding hereunder shall not exceed \$———.

(2) *Depository.* The bank designated for the deposit of payments made hereunder shall be:

(3) *Interest Charge.* No interest shall be charged for advance payments made hereunder. The Contractor shall charge interest at the rate of 6 percent per annum on subadvances or down payments to subcontractors, and such interest will be credited to the account of the Government. However, interest need not be charged on subadvances on nonprofit subcontracts with nonprofit educational or research institutions for experimental, research or development work.

(4) *Administering Office.* The office administering advance payments shall be the office designated as having responsibility for awarding the contract.

(l) *Other Security.* The terms of this contract shall be considered adequate security for advance payments hereunder, except that if at any time the administering office deems the security furnished by the Contractor to be inadequate, the Contractor shall furnish such additional security as may be satisfactory to the administering office, to the extent that such additional security is available.

(End of clause)

CLAUSE NO. 8—EXAMINATION OF RECORDS  
(JUNE 1977)

(a) This clause is applicable if the amount of this contract exceeds \$2,500 and was entered into by means of negotiation including small business restricted advertising, but is not applicable if this contract was entered into by means of formal advertising.

(b) The Contractor agrees that the Comptroller General of the United States and the Secretary, or any of their duly authorized representatives, shall until expiration of 3 years after final payment under this contract or of the time period for the particular records in Part 1-20 of the Federal Procurement Regulations (41 CFR Part 1-20) which ever expires earlier, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.

(c) The Contractor further agrees to include in all its subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States, or his/her duly authorized representatives shall, until expiration of 3 years after final payment under the subcontract or of the time periods for the particular records specified in Part 1-20 of the Federal Procurement Regulations (41 CFR

## Appendix A—Public Health Services

PHS 352.280-4

Part 1-20) whichever expires earlier, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (1) purchases orders not exceeding \$2,500 and (2) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

(d) The periods of access and examination described in (b) and (c) above, for records which relate to (1) appeals under the "Disputes" clause of this contract, (2) litigation or the settlement of claims arising out of the performance of this contract, or (3) costs and expenses of this contract as to which exception has been taken by the Comptroller General or any of his/her duly authorized representatives, shall continue until such appeals, litigation, claims, or exceptions have been disposed of.

(End of clause)

### CLAUSE NO. 9—INSPECTION AND REPORTS (JUNE 1977)

(a) *Inspection of work.* The Government shall have the right to inspect the work and activities under this contract, including without limitation, premises where any Government property may be located at such reasonable times and in such manner as it may deem appropriate and the Contractor shall afford the Government proper facilities and assistance for such inspection.

(b) *Reports.* The Contractor shall furnish such progress reports, schedules, financial and cost reports, and other reports, concerning the work under this contract as specified elsewhere in this contract. Cost and other financial data and projections furnished pursuant to this paragraph (b) shall not relieve the Contractor of the requirements for furnishing notice specified in the clause of this contract entitled "Limitation of Cost."

(c) In addition, where Federal financial assistance is involved in the contract effort, the following clause will apply:

#### *Reports to the Indian People*

The contractor, as a recipient of Federal financial assistance, shall make reports and information available to the Indian people served or represented by the contractor. Such reports will reflect how the Federal assistance funds were utilized to the benefit of the Indian people served or represented as follows: (specific reporting requirements, formats and methods of distribution to the Indian people will be prescribed in the scope of the contract.)

#### (d) *Annual Reporting.*

(1) For each fiscal year during which a tribal organization receives or expends funds pursuant to a contract under this Part, the

tribe which requested the contract must submit a report to the Contracting Officer. The report shall include, but not be limited to, an accounting of the amounts and purposes for which the contract funds were expended and information on the conduct of the program or services involved. The reports shall include any other information requested by the Contracting Officer and may be submitted as follows:

(i) When the contract is with the governing body of an Indian tribe, the tribe shall submit the report to the Contracting Officer.

(ii) When the contract is with a tribal organization other than the governing body of the tribe, the tribe has the option of having the tribal organization prepare the report and submit it to the tribe for review and approval before the tribe submits it to the Contracting Officer.

(iii) When the contract benefits more than one tribe, the tribal organization shall prepare and submit the report to each of the tribes benefiting under the contract. Each tribe shall endorse the report before submitting it to the Contracting Officer.

(2) The annual report shall be submitted to the Contracting Officer within 90 days of the end of the fiscal year in which the contract was performed. However, the period for submitting the report may be extended if there is just cause for such extension.

(3) In addition to the yearly reporting requirement given in paragraphs (a) and (b) of this section, the tribal contractor shall furnish other reports when and as required by the Secretary.

(End of clause)

### CLAUSE NO. 10—SUBCONTRACTING (JUNE 1977)

(a) *Prior approval required.* Except as provided in (c) below, the Contractor shall not enter into any subcontract or purchase order not otherwise expressly authorized elsewhere in this contract without the prior written approval of the Contracting Officer and subject to such conditions as the Contracting Officer may require.

(b) *Request for approval.* The Contractor's request for approval to enter into a subcontract pursuant to this clause shall include: (1) A description of the supplies or services to be called for by the subcontract; (2) identification of the proposed subcontractor and an explanation of why and how the proposed subcontractor was selected, including the degree of competition obtained; (3) the proposed subcontract price, together with the Contractor's cost or price analysis thereof; (4) identification of the type of subcontract to be used; (5) a copy or draft of the proposed subcontract, if available; and (6) any other information which the Contracting Officer may require.

(c) *Certain purchases of property and services.* Prior written approval shall not be required for firm fixed-price subcontracts for the purchase or rental of items of personal property having a unit acquisition cost of less than \$200 or for subcontracts in a total amount less than \$1,000 unless otherwise specified elsewhere in this contract: Provided, however, That advance notification shall be given by the Contractor of any subcontract which exceeds in dollar amount 5 percentum of the total estimated cost of this contract.

(d) *Contractor's procurement system.* The contractor shall use methods, practices or procedures in subcontracting or purchasing (hereinafter referred to as the Contractor's "procurement system") acceptable to the Contracting Officer. The Contracting Officer may, at any time during the performance of this contract, require the Contractor to provide information concerning its procurement system.

(e) *Effect of subcontracting.* Subcontracts shall be made in the name of the Contractor and shall not bind nor purport to bind the Government. The making of subcontracts hereunder shall not relieve the Contractor of any requirement under this contract (including, but not limited to, the duty to properly supervise and coordinate the work of subcontracts, and the duty to maintain and account for property pursuant to the clause of this contract entitled "Government Property"). Approval of the provisions of any subcontract by the Contracting Officer shall not be construed to constitute a determination of the allowability of any cost under this contract, unless such approval specifically provides that it constitutes a determination of the allowability of such cost. In no event shall approval of any subcontract by the Contracting Officer be construed as effecting any increase in the estimated cost set forth in this contract. No subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis.

(f) *Procurements from contractor-controlled sources.* Procurement or transfer of equipment, materials, supplies, or services from contractor-controlled source (any division or other organizational component of the prime contractor, exclusive of the contracting component, and any subsidiary or affiliate of the Contractor under a common control) shall be considered a subcontract for the purpose of this clause.

(End of clause)

CLAUSE NO. 11—ACCOUNTS, AUDIT AND RECORDS (JUNE 1977)

(a) The Contractor shall maintain books, records, documents, and other evidence, accounting procedures, and practices, sufficient to reflect properly all direct and indi-

rect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. The foregoing constitutes "records" for the purposes of this clause.

(b) The Contractor's facility(ies), or such part thereof as may be engaged in the performance of this contract, and its records shall be subject at all reasonable times to inspection and audit by the Contracting Officer or his/her authorized representative.

(c) The contractor shall preserve and make available its records (1) until the expiration of 3 years from the date of final payment under this contract, or the time periods for the particular records specified in (41 CFR Part 1-20), whichever expires earlier and (2) for such longer period, if any, as is required by applicable statute, or by other clause of this contract, or by (i) or (ii) below.

(i) If this contract is completely or partially retroceded or reassumed by the Government, the records relating to the work terminated shall be preserved and made available for a period of 3 years from the date of any resulting final settlement.

(ii) Records which relate to (A) appeals under the "Disputes" clause of this contract, (B) litigation or the settlement of claims arising out of the performance of this contract, or (C) costs and expenses of this contract to which exception has been taken by the Contracting Officer or any of his/her duly authorized representatives, shall be retained until such appeals, litigation, claims, or exceptions have been disposed of.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract hereunder that is not firm fixed-price or fixed-price with escalation. When so inserted, changes shall be made to designate the higher-tier subcontractor at this level involved in place of the Contractor: to add "of the Government prime contract" in place of "this contract" in (B) of subparagraph (c)(ii) above.

(End of clause)

CLAUSE NO. 12—GOVERNMENT PROPERTY (JUNE 1977)

(a) *Government furnished property.* (1) The Government reserves the right to furnish any property or services required for the performance of the work under this contract.

(2) The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described elsewhere in this contract, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (such property to be referred to as "Government furnished property").

In the event that Government furnished property is not delivered to the contractor

by the time or times as stated, or if not stated, in sufficient time to enable the Contractor to meet such delivery or performance dates under this contract, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay occasioned the Contractor and make appropriate equitable adjustments to any contractual provisions affected by any such delay in accordance with the provisions of the clause of this contract entitled "Changes."

In the event that Government furnished property is received by the Contractor in a condition not suitable for the intended use, the Contractor shall, immediately upon receipt thereof, notify the Contracting Officer of such fact, and, as directed by the Contracting Officer either (i) return or otherwise dispose of such property, or (ii) effect repairs or modifications thereto. Upon completion of (i) or (ii) above, the Contracting Officer, upon timely written request of the Contractor, shall make appropriate equitable adjustments to any contractual provisions affected thereby in accordance with the provisions of the clause of this contract entitled "Changes." The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government furnished property or delivery of such property in a condition not suitable for its intended use.

(b) *Title.* (1) Title to all property furnished by the Government shall remain in the Government. Title to all property purchased by the Contractor, the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by the vendor. Title to other property, the cost of which is reimbursable to the Contractor under this contract, shall pass and vest in the Government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencement of processing or use of such property in the performance of this contract, or (iii) reimbursement of the cost thereof by the Government in whole or in part, whichever first occurs. All Government furnished property, together with all property acquired by the Contractor, title to which vests in the Government under this paragraph, are subject to the provisions of this clause and are hereinafter collectively referred to as "Government property."

(2) Title to the Government property shall not be affected by the incorporation or attachment thereof to any property now owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity or personality by reason of affixation to any realty.

(c) *Use of Government property.* Government property shall, unless otherwise provided

herein or approved by the Contracting Officer, be used only for the performance of this contract.

(d) *Property management and control.* The Contractor shall maintain and administer in accordance with sound business practice a program for the maintenance repair, protection, and preservation, control of and accountability for Government property, so as to assure its full availability and usefulness for the performance of this contract. The Contractor shall comply with Federal, State, and local laws, codes, ordinances, regulations, and orders pertaining to standards of construction, safety, environment quality, energy conservation, historic site preservation, facilities for the handicapped, emergency preparedness, and other requirements that are applicable to the physical characteristics, operation, and maintenance of Government property. The Contractor agrees to promptly receipt for all Government property in a form and manner as prescribed by the Contracting Officer. The Contractor further agrees to take all reasonable steps to comply with all directions or instructions which the Contracting Officer may prescribe regarding the management and control of Government property.

(e) *Risk or loss.* (1) The Contractor shall not be liable for any loss of or damage to Government property, or for expenses incidental to such loss or damage, except that the Contractor shall be responsible for any such loss or damage (including expenses incidental thereto);

(i) Which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of its managers, superintendents, or other equivalent representatives, who have supervision or direction of

(A) all or substantially all of the Contractor's operations at any one plant, laboratory or separate location in which this contract is being performed or

(B) a separate and complete major organization, industrial or otherwise in connection with the performance of this contract;

(ii) Which results from a failure on the part of the Contractor, due to willful misconduct or lack of good faith on the part of any of its directors, officers, or other representatives mentioned in subparagraph (i) above, (A) to maintain and administer, in accordance with sound business practice, the program for maintenance, repair, protection, and preservation of Government property as required by paragraph (d) hereof, or (B) to take all reasonable steps to comply with any appropriate written directions of the Contracting Officer under paragraph (4) hereof;

(iii) For which the Contractor is otherwise responsible under the express terms of this contract;

(iv) Which results from a risk expressly required to be insured under this contract, but

only to the extent of the insurance so required to be procured and maintained, or to the extent of insurance actually procured and maintained, whichever is greater; or

(v) Which results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement; Provided That, if more than one of the above exceptions shall be applicable in any case, the Contractor's liability under any one exception shall not be limited by any other exception.

(2) If the Contractor transfers Government property to the possession and control of a subcontractor the transfer shall not affect the liability of the Contractor for loss or destruction of or damage to Government property as set forth in (1) above. The Contractor shall require the subcontractor to assume the risk of and be responsible for any loss or destruction of or damage to Government property while in the latter's possession or control, and the subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received (except for reasonable wear and tear or for the utilization of the property in accordance with the provisions of this contract). Provided, however, That the subcontractor may be relieved from such liability only to the extent that the subcontract, with the prior approval of the Contracting Officer, so provides.

(3) The Contractor shall not be reimbursed for, and shall not include as an item of overhead, the cost of insurance, or any provisions for a reserve, covering the risk of loss or damage to the Government property, except to the extent that the Government may have required the Contractor to carry such insurance under any other provision of this contract.

(4) Upon the happening of loss or destruction of or damage to the Government property, the Contractor shall notify the Contracting Officer thereof, and shall take all reasonable steps to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the Government property in the best order, and furnish to the Contracting Officer a statement of:

- (i) The lost, destroyed, and damaged Government property;
- (ii) The time and origin of the loss, destruction or damage;
- (iii) All known interests in commingled property of which the Government property is a part; and
- (iv) The insurance, if any, covering any part of or interest in such commingled property.

The Contractor shall make repairs and renovation of the damaged Government property, or take such other actions as the Contracting Officer directs.

(5) In the event the Contractor is indemnified, reimbursed, or otherwise compensated for any loss or destruction of or damage to the Government property, it shall use the proceeds to repair, renovate, or replace the Government property involved, or shall credit such proceeds against the cost of the work covered by the contract, or shall otherwise reimburse the Government, as directed by the Contracting Officer. The loss, destruction or damage and, upon the request of the Contracting Officer, shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including assistance in the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where a subcontractor has not been relieved from liability for any loss or destruction of or damage to Government property, the Contractor shall enforce the liability of the subcontractor for such loss or destruction of or damage to the Government property for the benefit of the Government.

(f) *Disposition of Government property.*

(1) During the period of performance of this contract, the Contractor shall promptly and regularly report to the Contracting Officer, in such form and manner as the Contracting Officer may direct, concerning the status of Government property under the contract, including all Government property in the Contractor's possession which is not in use or which is excess to the needs of the contract. The Contractor shall make such disposition of Government property as the Contracting Officer may direct. The Contractor shall in no way be relieved of responsibility for Government property without the prior written approval of the Contracting Officer.

(2) Upon completion or expiration of this contract, or at such earlier date as may be fixed by the Contracting Officer, the Contractor shall render an accounting, as prescribed by the Contracting Officer, of all Government property which had come into the possession or custody of the Contractor under this contract. Such accounting shall include inventory schedules covering all items of Government property not consumed in the performance of this contract, or not theretofore delivered to the Government, or for which the Contractor has not otherwise been relieved of responsibility. The Contractor shall deliver or make such other disposition of Government property covered in such inventory schedules as the Contracting Officer may direct.

(3) The net proceeds of any disposition of Government property, in accordance with (1) and (2) above, shall be credited to the cost of the work covered by the contract or shall be paid in such manner as the Contracting Officer may direct.

(g) *Restoration of premises.* Unless otherwise provided herein, the Government shall not be

## Appendix A—Public Health Services

PHS 352.280-4

under any duty or obligation to restore or rehabilitate, or to pay the costs of the restoration or rehabilitation of the Contractor's facility or any portion thereof which is affected by removal of any Government property.

(End of clause)

### CLAUSE NO. 13—CHANGES (JUNE 1977)

The Contracting Officer may at any time, with the consent of the Contractor, by a written order, and without notice to the sureties, if any, make changes, within the general scope of this contract, in any one or more of the following: (a) Drawings, designs, or specifications; (b) method of shipment or packing; (c) place of inspection, delivery, or acceptance; and (d) the amount of Government furnished property. If any such change causes an increase or decrease in the estimated cost of, or the time required for performance of this contract, or otherwise affects any other provisions of this contract, whether changed or not by any such order, an equitable adjustment shall be made (a) in the estimated cost or delivery schedule, or both, and (b) in such other provisions of the contract as may be so affected, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within thirty (30) days from the date of receipt by the Contractor of the notification of change: Provided, however, That the Contracting Officer, if he/she decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as a result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(End of clause)

### CLAUSE NO. 14—NOTICE TO THE GOVERNMENT OF DELAYS (JUNE 1977)

Whenever the Contractor has knowledge that any actual or potential situation, including, but not limited to, labor disputes, is delaying or threatens to delay the timely performance of the work under this contract, the Contractor shall immediately give written notice thereof, including all relevant information with respect thereto, to the Contracting Officer.

(End of clause)

### CLAUSE NO. 15—RETROCESSION (JUNE 1977)

(a) The Indian Tribe that initially requested this contract may also request its retrocession, notwithstanding the fact that the Contractor may be a tribal organization other than the Tribe.

(b) Should the Tribe request retrocession of the contract and the Contractor is other than the Tribe, the Contracting Officer will notify the Contractor of the request and in consultation with the Tribe and the Contractor establish the effective date of the retrocession. The retrocession will become effective no later than 120 days after the Contracting Officer receives the Tribe's request unless the Tribe and the Contracting Officer mutually agree on a later date.

(c) Immediately after receipt of the request for retrocession and where applicable notifying the Contractor, the Contracting Officer will meet with the Contractor and, where applicable, the tribal governing body or bodies, mutually agree to:

- (1) A plan for the orderly transfer of responsibilities;
- (2) A plan for inventorying materials and supplies on hand;
- (3) An accounting for funds, including but not limited to current and anticipated obligations;
- (4) The cost of operation until retrocession; and,
- (5) The identification of all records relating to the contract and the contracted function.

(End of clause)

### CLAUSE NO. 16—ASSUMPTION AND REASSUMPTION OF CONTRACT PROGRAMS (JUNE 1977)

(a) When the Director or his/her delegate determines that the performance of a Contractor under these regulations involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons, or (2) gross negligence or the mismanagement in the handling or use of funds under the contract, he/she will, in writing, notify the contractor of such determinations and will request that the Contractor take such corrective action within such period of time as the Director or his/her delegate may prescribe.

(b) When the Director or his/her delegate determines that a Contractor has not taken corrective action (as prescribed by him/her under paragraph (a) of this section) to his/her satisfaction, he/she may, after the Contractor has been provided an opportunity for a hearing in accordance with paragraph (c) of this section, rescind the contract in whole or in part and, if he/she deems it appropriate, assume or resume control or operation of the program, activity, or service involved.

(c)(1) When the Director or his/her delegate has made a determination described in paragraph (b) of this section, he/she shall in writing notify the Contractor of such determination and of the Contractor's right to request a review of such determination and of the determination described in paragraph (a) of this section. Such notification by the Director or his/her delegate shall set forth the reasons for the determination in sufficient detail to enable the Contractor to respond and shall inform the Contractor of its right to a hearing on the record before a Contract Appeals Board described in paragraph (d) of this section. Upon the request of the Contractor for a hearing, the Board, established pursuant to paragraph (d) of this section shall in writing within 10 days of the establishment notify the Contractor of the time, place and date of the hearing which will be held not later than 45 days after the request for a hearing.

(2) Where the Director or his/her delegate determines that a Contractor's performance under a contract awarded under this subpart poses an immediate threat to the safety of any person, he/she may immediately rescind the contract in whole or in part and, if he/she deems it appropriate, assume or resume control or operation of the program, activity, or service involved. Upon such a decision he/she will immediately notify the Contractor of such action and the basis therefor; and offer the Contractor an opportunity for a hearing on the record before the Contract Appeals Board established pursuant to paragraph (d) of this section to be held within 10 days of each action.

(d)(1) The Contract Appeals Board shall be composed of 3 persons appointed by the Director, Indian Health Service. Such persons may not be selected from the immediate office of any person participating in the determination at issue. The Board shall afford the Contractor the right:

- (i) To notice of the issues to be considered;
- (ii) To be represented by counsel;
- (iii) To present witnesses on Contractor's behalf;
- (iv) To cross-examine other witnesses either orally or through written interrogatories; and
- (v) To compel the appearance of Indian Health Service personnel or to take depositions of such persons at reasonable times and places.

(2) The Contract Appeals Board shall make an initial written decision which shall become final within 20 days unless the Director, Indian Health Service or his/her representative modifies or reverses the decision. Any such decision by the Director of the Indian Health Service or his/her representative shall be in writing, shall be specific as to the reasons for such decision, and shall be considered final.

(3) Where the Board is considering issues arising under paragraph (2) of this section, the Board shall within 25 days after the conclusion of the hearing, notify all parties in writing of its decision.

(c) In any case where the officer has rescinded a contract under paragraph (b) or (c) of this section, he/she may decline to enter into a new contract agreement with the Contractor until such time as he/she is satisfied that the basis for the rescission has been corrected.

Nothing in this section shall be construed as contravening the Occupational Safety and Health Act of 1970 (84 Stat. 1590), as amended (29 U.S.C. 651).

(End of clause)

#### CLAUSE NO. 17—KEY PERSONNEL (JUNE 1977)

Where "key personnel" have been identified in this contract, it has been determined that such named personnel are necessary for the successful performance of the work under this contract; and the Contractor agrees to assign such personnel to the performance of the work under this contract, and shall not reassign or remove any of them without the consent of the Contracting Officer. Whenever, for any reason, one or more of the aforementioned personnel is unavailable for assignment for work under the contract, the Contractor shall immediately notify the Contracting Officer to that effect and shall, subject to the approval of the Contracting Officer without formal modification to the contract, replace such personnel with personnel of substantially equal ability and qualifications.

(End of clause)

#### CLAUSE NO. 18—LITIGATION AND CLAIMS (JUNE 1977)

The Contractor shall give the Contracting Officer immediate notice in writing of (a) any action, including any proceeding before an administrative agency, filed against the Contractor arising out of the performance of this contract, including, but not limited to, the performance of any subcontract hereunder; and (b) any claim against the Contractor the cost and expense of which is allowable under the clause entitled "Allowable Cost," except as otherwise directed by the Contracting Officer, the Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor with respect to such action or claim. To the extent not in conflict with any applicable policy of insurance, the Contractor may, with the Contracting Officer's approval, settle any such action or claim. If required by the Contracting Officer, the Contractor shall (a) effect an assignment and subrogation in favor of the Government of

## Appendix A—Public Health Services

PHS 352.280-4

all the Contractor's rights and claims (except those against the Government) arising out of any such action or claim against the Contractor; and (b) authorize representatives of the Government to settle or defend any such action or claim and to represent the Contractor in, or to take charge of, any action. If the settlement or defense of an action or claim is undertaken by the Government, the Contractor shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action against the Contractor is not covered by a policy of insurance, the Contractor shall, with the approval of the Contracting Officer, proceed with the defense of the action in good faith. The Government shall not be liable for the expense of defending any action or for any cost resulting from the loss thereof to the extent that the Contractor would have been compensated by insurance which was required by law or regulation or by written direction of the Contracting Officer, but which the Contractor failed to secure through its own fault or negligence.

In any event, unless otherwise expressly provided in this contract, the Contractor shall not be reimbursed or indemnified by the Government for any liability loss, cost or expense, which the Contractor may incur or be subject to by reason of any loss, injury, or damage, to the person or to real or personal property of any third parties as may accrue during, or arise from, the performance of this contract.

(End of clause)

### CLAUSE NO. 19—INDEMNITY AND INSURANCE (JUNE 1977)

(a) The Contractor shall indemnify and save and keep harmless the Government against any or all loss, cost, damage, claim, expense or liability whatsoever, because of accident or injury to persons or property or others occurring in connection with any program included as a part of this contract, by providing where applicable, the insurance described below:

(b) The Contractor shall secure, pay the premium for, and keep in force until the expiration of this contract, or any renewal period thereof, insurance as provided below. Such insurance policies shall specifically include a provision stating the liability assumed by the Contractor under this contract.

(1) Workman's compensation insurance as required by laws of the state.

(2) Owner's, landlord's, and tenant's bodily injury liability insurance with limits of not less than \$50,000 for each person and \$500,000 for each accident.

(3) Property damage liability insurance with limits of not less than \$25,000 for each accident.

(4) Automobile bodily injury liability insurance with limits of not less than \$50,000 for each person, and \$500,000 for each accident and property damage liability insurance with a limit of not less than \$5,000 for each accident.

(5) Food products liability insurance with limits of not less than \$50,000 for each person and \$500,000 for each accident.

(6) Professional malpractice insurance where medical, dental and other health professional services are involved.

(7) Other liability insurance not specifically mentioned when required.

(c) Each policy of insurance shall contain an endorsement providing that cancellation by the insurance company shall not be effective unless a copy of the cancellation is mailed (registered) to the Contracting Officer 30 days prior to the effective date of cancellation.

(d) A certificate of each policy of insurance, and any change therein, shall be furnished to the Contracting Officer immediately upon receipt from the insurance company.

(e) Insurance companies of the Contractor shall be satisfactory to the Contracting Officer. When in his/her opinion an insurance company is not satisfactory for reasons that will be stated, the Contractor shall provide insurance through companies that are satisfactory to the Contracting Officer.

(f) Each policy of insurance shall contain a provision that the insurance carrier waives any rights it may have to raise as a defense the tribe's sovereign immunity from suit, but such waivers shall extend only to claims the amount and nature of which are within the coverage and limits of the policy of insurance. The policy shall contain no provision, either expressed or implied, that will serve to authorize or empower the insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy insurance.

(End of clause)

### CLAUSE NO. 20—OVERTIME (JUNE 1977)

Except as provided in this contract, the Contractor shall not perform overtime work under or in connection with this contract for which premium compensation is required to be paid, without specific written approval from the Contracting Officer.

(End of clause)

### CLAUSE NO. 21—FOREIGN TRAVEL (JUNE 1977)

Foreign travel shall not be performed without the prior written approval of the Contracting Officer. As used in this clause "Foreign Travel" means travel outside the United States, its Territories and Possessions, and Canada.

(End of clause)

CLAUSE No. 22—QUESTIONNAIRE AND SURVEYS  
(JUNE 1977)

In the event the performance of this contract involves the collection of information upon identical items from 10 or more persons, other than Federal employees, the Contractor shall obtain written approval from the Contracting Officer, prior to the use thereof, of any forms, schedules, questionnaires, survey plans or other documents, and any revisions thereto, intended to be used in such collection.

(End of clause)

CLAUSE No. 23—PRINTING (JUNE 1977)

Unless otherwise specified in this contract, the Contractor shall not engage in, nor subcontract for, any printing (as that term is defined in Title I of the Government Printing and Binding Regulations in effect on the effective date of this contract) in connection with the performance of work under this contract; Provided, however, That performance of a requirement under this contract involving the reproduction of less than 5,000 production units of any one page or less than 25,000 production units in the aggregate of multiple pages, will not be deemed to be printing. A production unit is defined as one sheet, size 8 by 10 and ½ inches, one side only, one color.

(End of clause)

CLAUSE No. 24—SERVICES OF CONSULTANTS  
(JUNE 1977)

Except as otherwise expressly provided elsewhere in this contract, and notwithstanding the provisions of the clause of this contract entitled "Subcontracting," the prior written approval of the Contracting Officer shall be required:

(a) Whenever any employee of the Contractor is to be reimbursed as a "consultant" under this contract; and

(b) For the utilization of the services of any consultant under this contract exceeding the daily rate set forth elsewhere in this contract or, if no amount is set forth, \$100, exclusive of travel costs or where the services of any consultant under this contract will exceed 10 days in any calendar year. Whenever Contracting Officer approval is required, the Contractor will obtain and furnish to the Contracting Officer information concerning the need for such consultant services and the reasonableness of the fees to be paid, including but not limited to, whether fees to be paid to any consultant exceed the lowest fee charged by such consultant to others for performing consultant services of a similar nature.

(End of clause)

CLAUSE No. 25—ASSIGNMENT OF CLAIMS (JUNE 1977)

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), if this contract provides for payments aggregating \$1,000 or more, claims for moneys due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Unless otherwise provided in this contract, payment to assignee of any moneys due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or setoff. (The preceding sentence applies only if this contract is made in time of war or national emergency as defined in said Act and is with the Department of Defense, the General Services Administration, the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency or any other department or agency of the United States designated by the President pursuant to Clause 4 of the proviso of section 1 of the Assignment of Claims Act of 1940, as amended by the Act of May 15, 1951, 65 Stat. 41.)

(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret," "Secret," or "Confidential," be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same. However, a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

(End of clause)

CLAUSE No. 26—CONTRACT WORK HOURS AND SAFETY STANDARD ACT—OVERTIME COMPENSATION (JUNE 1977)

This contract, to the extent that it is of a character specified in the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330), is subject to the following provisions and to all other applicable provisions and exceptions of such Act and the regulations of the Secretary of Labor thereunder.

## Appendix A—Public Health Services

PHS 352.280-4

(a) *Overtime requirements.* No Contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic in any workweek in which he/she is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek on work subject to the provisions of the Contract Work Hours Standards Act unless such laborer or mechanic receives compensation at a rate not less than one and one-half times his/her basic rate of pay for all such hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, whichever is the greater number of overtime hours.

(b) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violation of the provisions of paragraph (a), the Contractor and any subcontractor responsible therefor shall be liable to any affected employee for his/her unpaid wages. In addition, such Contractor and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the provisions of paragraph (a) in the sum of \$10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by paragraph (a).

(c) *Withholding for unpaid wages and liquidated damages.* The Contracting Officer may withhold from the Government Prime Contractor, from any moneys payable on account of work performed by the Contractor or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for unpaid wages and liquidated damages as provided in the provisions of paragraph (b).

(d) *Subcontracts.* The Contractor shall insert paragraphs (a) through (d) of this clause in all subcontracts, and shall require their inclusion in all subcontracts for any tier.

(e) *Records.* The Contractor shall maintain payroll records containing the information specified in 29 CFR 516.2(a). Such records shall be preserved for three years from the completion of the contract. This requirement does not apply where the tribal contractor is the governing body of the tribe and the work is being performed by the tribal contractor or the tribe with its regular employees.

(End of clause)

### CLAUSE NO. 27—WALSH-HEALEY PUBLIC CONTRACTS ACT (JUNE 1977)

If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed \$10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act, as amended (41 U.S. Code 35-45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect. This requirement does not apply where the tribal contractor is the governing body of the tribe and the work is being performed by the tribal contractor or the tribe with its regular employees.

(End of clause)

### CLAUSE NO. 28—EQUAL OPPORTUNITY (JUNE 1977)

Subject to the Indian preference in training and employment of Clause 29 during the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this Equal Opportunity clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency Contracting Officer, advising the labor union or workers' representative of the Contractor's commitments under this Equal Opportunity clause, and shall post copies of the notice in

conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The Contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's non-compliance with the Equal Opportunity clause of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled, terminated, or suspended, in whole or in part, and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Contractor will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance. Provided, however, That in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

(End of clause)

CLAUSE NO. 29—INDIAN PREFERENCE IN  
TRAINING AND EMPLOYMENT (JUNE 1977)

(a) The Contractor shall give preference in employment for all work performed under the contract, including subcontracts thereunder, to qualified Indians<sup>0</sup> regardless of age, religion, or sex, and to the extent feasible consistent with the efficient performance of the contract, provide employment and training opportunities to Indians, regardless of age, religion, or sex, that are not fully quali-

fied to perform under the contract. The Contractor shall comply with any Indian preference requirements established by the Tribe receiving services under the contract to the extent that such requirements are consistent with the purpose and intent of this paragraph.

(b) If the Contractor or any of its subcontractors is unable to fill its employment openings after giving full consideration to Indians as required in paragraph (a) above, these employment openings may then be filled by other than Indians under the conditions set forth in the Equal Opportunity clause of this contract.

(c) The Contractor agrees to include this clause or one similar thereto in all subcontracts issued under the contract.

(End of clause)

CLAUSE NO. 30—CERTIFICATE OF  
NONSEGREGATED FACILITIES (JUNE 1977)

By signing the contract the Contractor certifies that it does not maintain or provide for its employees any segregated facilities at any of its establishments, and that it does not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. It certifies further that it will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it will not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. The Contractor agrees that a breach of this certification is a violation of the Equal Opportunity clause in this contract. As used in this certification, the term "segregated facilities" means any waiting rooms, work areas, rest rooms, and wash rooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive or are in fact segregated on the basis of race, color, religion, or national origin, because of habit, local custom or otherwise. It further agrees that (except where it has obtained identical certifications from proposed subcontractors for specific time periods) it will obtain identical certifications from proposed subcontractors prior to the award of subcontracts exceeding \$10,000 which are not exempt from the provisions of the Equal Opportunity clause; that it will retain such certifications in its files; and that it will forward the following notice to such proposed subcontractors (except where the proposed subcontractors have submitted identical certifications for specific time periods):

## Appendix A—Public Health Services

PHS 352.280-4

Notice to prospective subcontractors of requirement for certifications of nonsegregated facilities. A certificate of Nonsegregated Facilities must be submitted prior to the award of a subcontract exceeding \$10,000 which is not exempt from the provisions of the Equal Opportunity clause. The certification may be submitted either for each subcontract or for all subcontracts during a period (i.e., quarterly, semiannually, or annually).

(End of clause)

### CLAUSE No. 31—CONVICT LABOR (JUNE 1977)

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor, except as provided by Public Law 89-176, September 10, 1965 (18 U.S.C. 4082(c)(2)), and Executive Order No. 11755, December 29, 1973.

(End of clause)

### CLAUSE No. 32—OFFICIALS NOT TO BENEFIT (JUNE 1977)

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

(End of clause)

### CLAUSE No. 33—BUY AMERICAN ACT FOR SUPPLY AND SERVICE CONTRACTS (JUNE 1977)

(a) In acquiring end products, the Buy American Act (41 U.S. Code 10a-d) provides that the Government give preference to domestic source end products. For the purpose of this clause:

(i) "Components" means those articles, materials, and supplies which are directly incorporated in the end products;

(ii) "End products" means those articles, materials, and supplies which are to be acquired under this contract for public use; and

(iii) A "domestic source end product" means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. For the purpose of this (a)(iii) (B), components of foreign origin of the same type or kind as the products referred to in (b) (ii) or (iii) of this clause shall be treated as components mined, produced or manufactured in the United States.

(b) The Contractor agrees that there will be delivered under this contract only domestic source end products, except end products:

(i) Which are for use outside the United States;

(ii) Which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality;

(iii) As to which the Secretary determines the domestic preference to be inconsistent with the public interest; or

(iv) As to which the Secretary determines the cost to the Government to be unreasonable.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954).

(End of clause)

### CLAUSE No. 34—ANTI-KICKBACK ACT (JUNE 1977)

(a) Public Law 86-695, September 2, 1960 (41 U.S.C. 51-54) among other things prohibits the payment, directly or indirectly, by or on behalf of a subcontractor in any tier under any Government negotiated contract of any fee, gift or gratuity to the prime contractor or any higher tier subcontractor or any officer, agent, partner or employee thereof, as an inducement or acknowledgment for the award of a subcontract or order.

(b) The provisions of Public Law 86-695 are applicable to this contract and any subcontracts entered into under the contract.

(End of clause)

### CLAUSE No. 35—USE OF INDIAN BUSINESS CONCERNS (JUNE 1977)

(a) As used in this clause, the term "Indian business concern" means Indian organizations or an Indian-owned economic enterprise as defined in 42 FR 36.204(i).

(b) The contractor agrees to give preference to qualified Indian business concerns in the awarding of any subcontracts entered into under the contract consistent with the efficient performance of the contract. The contractor shall comply with any preference requirements regarding Indian business concerns established by the Tribe(s) receiving services under the contract to the extent that such requirements are consistent with the purpose and intent of this paragraph.

(c) If no Indian business concerns are available under the conditions in paragraph (b) above, the Contractor agrees to accomplish the maximum amount of subcontracting, as the Contractor determines is consistent with its efficient performance of the contract, with small business concerns, labor surplus area concerns or minority business enterprises, the definitions for which are contained in Subparts 1-1.7, 1-1.8, and 1-1.13 of the Federal Procurement Regulations. The Contractor is not, however, required to establish a small business, labor surplus, or

minority business subcontracting program as described in sections 1-1.710-3(b), 1-1.805-3(b), and 1-1.1310-2(b), respectively, of the Federal Procurement Regulations (41 CFR Chapter 1).

(End of clause)

CLAUSE NO. 36—PAYMENT OF INTEREST ON  
CONTRACTOR'S CLAIMS (JUNE 1977)

(a) If an appeal is filed by the Contractor from a final decision of the Contracting Officer under the Disputes clause of this contract, denying a claim arising under the contract, simple interest on the amount of the claim finally determined owed by the Government shall be payable to the Contractor. Such interest shall be at the rate determined by the Secretary of the Treasury pursuant to P.L. 92-41, 85 Stat. 97, from the date the Contractor furnished to the Contracting Officer his written appeal under the Disputes clause of this contract, to the date of (1) a final judgment by a court of competent jurisdiction, or (2) mailing to the Contractor of a supplemental agreement for execution either confirming completed negotiations between the parties or carrying out a decision of a board of contract appeals.

(b) Notwithstanding (a), above, (1) interest shall be applied only from the date payment was due, if such date is later than the filing of appeals, and (2) interest shall not be paid for any period of time that the Contracting Officer determines the Contractor has unduly delayed in pursuing its remedies before a board of contract appeals or a court of competent jurisdiction.

The Contractor further agrees to comply with any rules, regulations and reporting requirements which may be imposed by the HHS Office for Civil Rights for purposes of insuring the proper exercise of this authority. The Contractor agrees to insert this clause in all subcontract(s) under this contract.

(End of clause)

CLAUSE NO. 37—FAIR AND EQUAL TREATMENT  
OF INDIAN PEOPLE (JUNE 1977)

(a) The Contractor agrees consistent with medical needs to make no discriminatory distinctions among Indian patients or beneficiaries of this contract. For the purpose of this contract discriminatory distinctions include but are not limited to the following:

(i) denying a patient any service or benefit or availability of a facility;

(ii) providing any service or benefit to a patient which is different, or is provided in a different manner or at a different time from that provided to other patients under this contract; subjecting a patient to segregation or separate treatment in any manner related to his/her receipt of any service; restricting a patient in any way in the enjoyment of any

advantage or privilege enjoyed by others receiving any service or benefit; treating a patient differently from others in determining whether he/she satisfies any admission, enrollment, quota, eligibility membership, or other requirements of condition which individuals must meet in order to be provided any service or benefit; the assignment of times or places for the provision of services on the basis of discriminatory distinctions which may be made of the patients to be served.

(b) The Government reserves the right to reassume this contract in whole or in part whenever the Contractor fails to comply with the requirements of this clause.

(End of clause)

CLAUSE NO. 38—PRICE REDUCTION FOR  
DEFECTIVE COST OR PRICING DATA

The following clause applies to all contracts where cost and pricing data is required in accordance with P.L. 87-653.

*Price Reduction for Defective Cost or Pricing  
Data (June 1977)*

(a) If the Contracting Officer determines that any price negotiated in connection with this contract or any cost reimbursable under this contract was increased by any significant sums because the Contractor, or any subcontractor pursuant to the Clause of this contract entitled "Subcontractor Cost or Pricing Data" or "Subcontractor Cost or Pricing Data-Price Adjustments," or any subcontract clause therein required, furnished incomplete or inaccurate cost or pricing data or data not current as certified in its Contractor's Certificate of Current Cost or Pricing Data, then such price or cost shall be reduced accordingly and the contract shall be modified in writing to reflect such reduction.

(b) Failure to agree on a reduction shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause of this contract.

NOTE: Since this contract is subject to reduction under this clause by reason of defective cost or pricing data submitted in connection with certain subcontracts, it is expected that the Contractor may wish to include a clause in each such subcontract requiring the subcontractor to appropriately indemnify the Contractor. It is also expected that any subcontractor subject to such indemnification will generally require substantially similar indemnification for defective cost or pricing data required to be submitted by its lower tier subcontractors.)

## Appendix A—Public Health Services

PHS 352.280-4

(End of clause)

### CLAUSE NO. 39—SUBCONTRACTOR COST AND PRICING DATA

The following clauses should be included in all contracts, when the subcontracts of the type and size described therein are contemplated.

#### *Subcontractor Cost and Pricing Data (June 1977)*

(a) The Contractor shall require subcontractors hereunder to submit in writing cost or pricing data under the following circumstances:

(1) Prior to award of any cost-reimbursed type, time and material, labor-hour, incentive, or price redeterminable subcontract the price of which is expected to exceed \$100,000; and

(2) Prior to the award of any other subcontract, the price of which is expected to exceed \$100,000, or to the pricing of any subcontract change or other modification of which the price adjustment is expected to exceed \$100,000, where the price or price adjustment is not based on adequate price competition, established catalog or market price or commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(b) The Contractor shall require subcontractors to certify, substantially the same form as that used in the certificate by the Prime Contractor to the Government, that, to the best of their knowledge and belief, the cost and pricing data submitted under (a) above are accurate, complete, and current as of the date of the execution, which date shall be as close as possible to the date of agreement on the negotiated price of the subcontract or subcontract change or modification.

(c) The Contractor shall insert the substance of this clause including this paragraph (c) in each of its cost-reimbursement type, time and material, labor-hour, price redeterminable, or incentive subcontracts hereunder, and in any other subcontract hereunder which exceeds \$100,000 unless the price thereof is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. In each such expected subcontract hereunder which exceeds \$100,000, the Contractor shall insert the substance of the following clauses:

#### *Subcontractor Cost and Pricing Data—Price Adjustments*

(a) Paragraphs (b) and (c) of this clause shall become operative only with respect to any change or other modification made pursuant to one or more provisions of this contract which involves a price adjustment in

excess of \$100,000. The requirements of this clause shall be limited to such price adjustments.

(b) The Contractor shall require subcontractors hereunder to submit cost or pricing data under the following circumstances:

(1) Prior to award of any cost-reimbursement type, time and material, labor-hour, incentive, or price redeterminable subcontract, the price of which is expected to exceed \$100,000; and

(2) Prior to award of any other subcontract, the price of which is expected to exceed \$100,000, or to the pricing of any subcontract change or other modification for which the price adjustment is expected to exceed \$100,000, where the price or price adjustment is not based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(c) The Contractor shall require subcontractors to certify, in substantially the same form as that used in the Certificate by the Prime Contractor to the Government, that, to the best of their knowledge and belief, the cost and pricing data submitted under (b) above are accurate, complete, and current as of the date of the execution, which date shall be as close as possible to the date of agreement on the negotiated price of the contract modification.

(d) The Contractor shall insert the substance of this clause including this paragraph (d) in each subcontract hereunder which exceeds \$100,000.

(End of clause)

### CLAUSE NO. 40—PENALTIES (JUNE 1977)

(a) Any officer, director, agent, employee or such other person connected in any capacity with this contract or any subcontract thereunder that embezzles, willfully misapplies, steals or obtains by fraud any of the money, funds, assets or property provided through the contract shall be fined not more than \$10,000 or imprisoned for more than two years, or both; Provided, That if the amount embezzled, misapplied, stolen, or obtained by fraud does not exceed \$100, such person shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(b) The Contractor agrees to insert the clause in all subcontracts.

(End of clause)

### CLAUSE NO. 41—EFFECT ON EXISTING RIGHTS (JUNE 1977)

(a) Nothing in this contract shall be construed as:

(1) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity for suit enjoyed by an Indian tribe; or,

(2) Authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

(End of clause)

CLAUSE NO. 42—GENERAL SERVICES  
ADMINISTRATION (GSA) SUPPLY SOURCES

Indian tribal organizations which are awarded cost-reimbursement type contracts under the Indian Self-Determination Act, may be authorized to utilize GSA supply sources. The following clause will be inserted in all cost-reimbursement type contracts under which the Contractor may be authorized to acquire items for the account of the Government from GSA supply sources:

*General Services Administration Supply Sources*  
(June 1977)

The Contracting Officer may issue the Contractor an authorization to utilize General Services Administration supply sources for property to be used in the performance of this contract. Title to all property acquired by the Contractor under such an authorization shall vest in the Government, (1) unless otherwise specifically provided in the contract, (2) unless otherwise provided in the Government Property clause of this contract, or (3) in the absence of both the conditions in (1) and (2) of the clause. However, such property shall not be considered to be "Government-furnished property."

(End of clause)

(b) Insert the following clauses in fixed price contracts awarded under the Indian Self-Determination Act as described in Subpart PHS 380.4:

CLAUSE NO. 1—DEFINITIONS (JUNE 1977)

As used throughout this contract, the following terms shall have the meanings set forth below:

(a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department of Health and Human Services and the term "his/her duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or employee who is properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of the Contracting Officer acting within the limits of his/her authority.

(c) The term "Department" means the Department of Health and Human Services (HHS).

(d) The term "constituent agency" means the agency of the Department responsible for the administration of this contract.

(e) Except as otherwise provided in this contract, the term "subcontract" includes purchase orders under this contract.

(f) The term "Project Officer" means the person representing the Government for the purpose of technical direction of contract performance. The Project Officer is not authorized to issue any instructions or directions which effect any increase or decrease in the cost of this contract or which change the period of this contract.

(End of clause)

CLAUSE NO. 2—DISPUTES (JUNE 1977)

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his/her decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his/her duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

(End of clause)

CLAUSE NO. 3—CONTRACT WORK HOURS AND  
SAFETY STANDARD ACT—OVERTIME COM-  
PENSATION (JUNE 1977)

This contract, to the extent it is of a character specified in the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330), is subject to the following provisions and exceptions of such Act and the regulations of the Secretary of Labor thereunder.

## Appendix A—Public Health Services

PHS 352.280-4

(a) *Overtime requirements.* No Contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic in any workweek in which he/she is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek on work subject to the provisions of the Contract Work Hours Standard Act unless such laborer or mechanic receives compensation at a rate not less than one and one-half times his/her basic rate of pay for all such hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, whichever is the greater numbers of overtime hours.

(b) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violation of the provisions of paragraph (a), the Contractor and any subcontractor responsible therefor shall be liable to any affected employee for his/her unpaid wages. In addition, such Contractor and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the provisions of paragraph (a) at the sum of \$10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by paragraph (a).

(c) *Withholding for unpaid wages and liquidated damages.* The Contracting Officer may withhold from the Government Prime Contractor, from any moneys payable on account of work performed by the Contractor or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for unpaid wages and liquidated damages as provided in the provisions of paragraph (b).

(d) *Subcontracts.* The Contractor shall insert paragraphs (a) through (d) of this clause in all subcontracts, and shall require their inclusion in all subcontracts of any tier.

(e) *Records.* The Contractor shall maintain payroll records containing the information specified in 29 CFR 516.2(a). Such records shall be preserved for three years from the completion of the contract. This requirement does not apply where the tribal contractor is the governing body of the Tribe and the work is being performed by the tribal organization or Tribe with its own regular employees.

(End of Clause)

### CLAUSE No. 4—WALSH-HEALEY PUBLIC CONTRACTS ACT (JUNE 1977)

If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed \$10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act, as amended (41 U.S. Code 34-45), there are hereby incorporated by reference all representations and stipulations required by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect. This requirement does not apply where the tribal contractor is the governing body of the Tribe and the work is being performed by the tribal organization or Tribe with its own regular employees.

(End of Clause)

### CLAUSE No. 5—CONVICT LABOR (JUNE 1977)

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor except as provided by Public Law 89-176, September 10, 1965 (18 U.S.C. 4082(c)(2) and Executive Order No. 11755, December 29, 1973.

(End of clause)

### CLAUSE No. 6—NOTICE TO THE GOVERNMENT OF DELAYS (JUNE 1977)

Whenever the Contractor has knowledge that any actual or potential situation is delaying or threatens to delay the timely performance of this contract, the Contractor shall within ten days give notice thereof, including all relevant information with respect thereto, to the Contracting Officer.

(End of clause)

### CLAUSE No. 7—ASSIGNMENT OF CLAIMS (JUNE 1977)

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), if this contract provides for payment aggregating \$1,000 or more, claims for moneys due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for

two or more parties participating in such financing. Unless otherwise provided in this contract payments to assignee of any moneys due or due to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or setoff. (The preceding sentence applies only if this contract is made in time of war or national emergency as defined in said Act and is with the Department of Defense, the General Services Administration, the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, or any other department or agency of the United States designated by the President pursuant to Clause 4 of the proviso of section 1 of the Assignment of Claims Act of 1940, as amended by the Act of May 15, 1951, 65 Stat. 41).

(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret," "Secret," or "Confidential," be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same. However, a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

(End of clause)

CLAUSE NO. 8—OFFICIALS NOT TO BENEFIT  
(JUNE 1977)

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

(End of clause)

CLAUSE NO. 9—ANTI-KICKBACK ACT (JUNE 1977)

(a) Public Law 86-695, September 2, 1960 (41 U.S.C. 51-54) among other things, prohibits the payment, directly or indirectly, by or on behalf of a subcontractor in any tier under any Government negotiated contract of any fee, gift, or gratuity to the prime contractor or any officer, agent, partner or employee thereof, as an inducement or acknowledgment for the award of a subcontract or order.

(b) The provisions of Public Law 86-695 are applicable this contract and any subcontracts entered into under the contract.

(End of clause)

CLAUSE NO. 10—PENALTIES (JUNE 1977)

Any officer, director, agent, employee or such other person connected in any capacity with this contract or any subcontract there-

under that embezzles, willfully misapplies, steals or obtains by fraud any of the money, funds, assets or property provided through the contract shall be fined not more than \$10,000 or imprisoned for not more than two years, or both; Provided, That if the amount embezzled, misapplied, stolen, or obtained by fraud does not exceed \$100, such person shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(b) The Contractor agrees to insert this clause in all subcontracts.

(End of clause)

CLAUSE NO. 11—BUY AMERICAN ACT (JUNE 1977)

(a) In acquiring end products, the Buy American Act (41 U.S. Code 10a-d) provides that the Government give preference to domestic source end products. For the purpose of this clause:

(i) "Components" means those articles, materials, and supplies, which are directly incorporated in the end products;

(ii) "End products" means those articles, materials, and supplies, which are to be acquired under this contract for public use; and

(iii) "A domestic source end product" means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. For the purposes of this (a)(iii)(B), components of foreign origin of the same type or kind as the products referred to in (b) (ii) or (iii) of this clause shall be treated as components mined, produced, or manufactured in the United States.

(b) The Contractor agrees that there will be delivered under this contract only domestic source end products, except end products:

(i) Which are for use outside the United States;

(ii) Which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality;

(iii) As to which the Secretary determines the domestic preference to be inconsistent with the the public interest; or

(iv) As to which the Secretary determines the cost to the Government to be unreasonable. (The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954).

(End of clause)

CLAUSE NO. 12—EQUAL OPPORTUNITY (JUNE 1977)

Subject to the Indian preference requirements of Clause 17, during the performance

## Appendix A—Public Health Services

PHS 352.280-4

of this contract the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this Equal Opportunity clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency Contracting Officer, advising the labor union or workers representative of the Contractor's commitments under this Equal Opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations and relevant orders of the Secretary of Labor.

(e) The Contractor will furnish all information and reports required by executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the contracting agency and the secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's non-compliance with the Equal Opportunity clause of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled, terminated, or suspended, in whole or in part, and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule,

regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Contractor will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance. Provided, however, That in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

(End of clause)

### CLAUSE NO. 13—CERTIFICATE OF NONSEGREGATED FACILITIES (JUNE 1977)

By signing the contract the Contractor certifies that it does not maintain or provide for its employees any segregated facilities at any of its establishments, and that it does not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. It certifies further that it will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it will not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. The Contractor agrees that a breach of this certification is a violation of the Equal Opportunity clause in this contract. As used in this certification, the term "Segregated facilities" means any waiting rooms, work areas, rest rooms and wash rooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive or are in fact segregated on the basis of race, color, religion, or national origin, because of habit, local custom, or otherwise. It further agrees that (except where it has obtained identical certification from proposed subcontractors for specific time periods) it will obtain identical certifications from proposed subcontractors prior to the award of subcontracts exceeding \$10,000 which are not exempt from the provisions of the Equal Opportunity clause; that it will retain such certifications in its files; and that it will forward the following notice to such proposed subcontractors (except

where the proposed subcontractors have submitted identical certifications for specific time periods):

Notice to prospective subcontractors of requirement for certifications of nonsegregated facilities. A certification of Nonsegregated Facilities must be submitted prior to the award of a subcontract exceeding \$10,000 which is not exempt from the provisions of the Equal Opportunity clause. The certification may be submitted either for each subcontract or all subcontracts during a period (i.e., quarterly, semiannually, or annually).

(End of clause)

CLAUSE NO. 14—SUBCONTRACTING (JUNE 1977)

The Contractor shall not enter into subcontracts for any of the work contemplated under this contract without obtaining the prior written approval of the Contracting Officer and subject to such conditions and provisions as he/she may deem necessary, in his/her discretion, to protect the interests of the Government: Provided, however, That notwithstanding the foregoing, unless otherwise provided herein, such prior written approval shall not be required for the purchase by the Contractor of articles, supplies, equipment and services which are both necessary for and merely incidental to the performance of the requirements under this contract; Provided, further, however, That the aforesaid right of Contractor to engage such services shall in no event be construed to permit the Contractor to subcontract with a third-party for the performance of any major function contemplated under this contract to be performed by the Contractor, and Provided, further, however, That no provision of this clause and no such approval by the Contracting Officer of any subcontract shall be deemed in any event or in any manner to provide for the incurrence of any obligation of the Government in addition to the total contract price.

(End of clause)

CLAUSE NO. 15—COMPETITION IN  
SUBCONTRACTING (JUNE 1977)

The Contractor agrees to select subcontractors on a competitive basis to the maximum practical consistent with the objectives and requirements of this contract.

(End of clause)

CLAUSE NO. 16—USE OF INDIAN BUSINESS  
CONCERNS (JUNE 1977)

(a) As used in this clause, the term, "Indian business concern" means Indian organizations or an Indian-owned economic enterprise as defined in 42 CFR 36.204(i).

(b) The Contractor agrees to give preference to qualified Indian business concerns

in the awarding of any subcontracts entered into under the contract consistent with efficient performance of the contract. The Contractor shall comply with any preference requirements regarding Indian business concerns established by the tribe(s) receiving services under the contract to the extent that such requirements are consistent with the purpose and intent of this paragraph.

(c) If no Indian business concerns are available under the conditions in paragraph (b) above, the Contractor agrees to accomplish the maximum amount of subcontracting, as the Contractor determines is consistent with its efficient performance of the contract, with small business concerns, labor surplus area concerns or minority business enterprises, the definitions for which are contained in Subparts 1-1.7, 1-1.8, and 1-1.13 of the Federal Procurement Regulations. The Contractor is not, however, required to establish a small business, labor surplus, or minority business subcontracting program as described in sections 1-1.710-3(b), 1-1.805-3(b), and 1-1.1310-2(b), respectively of the Federal Procurement Regulations (41 CFR Chapter 1).

(End of clause)

CLAUSE NO. 17—INDIAN PREFERENCE IN  
TRAINING AND EMPLOYMENT (JUNE 1977)

(a) The Contractor shall give preference in employment for all work performed under the contract, including subcontracts thereunder, to qualified Indians regardless of age, religion, or sex, and to the extent feasible consistent with the efficient performance of the contract, provide employment and training opportunities to Indians, regardless of age, religion, or sex, that are not fully qualified to perform under the contract. The Contractor shall comply with any Indian preference requirements established by the tribe receiving services under the contract to the extent that such requirements are consistent with the purpose and intent of this paragraph.

(b) If the Contractor or any of its subcontractors is unable to fill its employment openings after giving full consideration to Indians as required in paragraph (a) above, these employment openings may then be filled by other than Indians under the conditions set forth in the Equal Opportunity clause of this contract.

(c) The Contractor agrees to include this clause or one similar thereto in all subcontracts issued under this contract.

(End of clause)

CLAUSE NO. 18—INSPECTION (JUNE 1977)

The Government, through any authorized representatives, has the right, at all reasonable times, to inspect, or otherwise evaluate

## Appendix A—Public Health Services

PHS 352.280-4

the work performed or being performed hereunder and the premises in which it is being performed. If any inspection, or evaluation is made by the Government on the premises of the Contractor or a subcontractor, the Contractor shall provide and shall require its subcontractors to provide all reasonable facilities and assistance for the safety and convenience of the Government representatives in the performance of their duties. All inspections and evaluations shall be performed in such a manner as will not unduly delay the work.

(End of clause)

### CLAUSE NO. 19—CHANGES (JUNE 1977)

The Contracting Officer may at any time, with the consent of the Contractor, by a written order, and without notice to the sureties, if any, make changes, within the general scope of this contract, in any one or more of the following (i) drawings, designs, or specifications, (ii) place of inspection, delivery, or acceptance, and (iii) the amount of Government-furnished property. If any such change causes an increase or decrease in the cost of, or the time required for performance of, this contract, or otherwise affects any other provisions of this contract, whether changed or not changed by any such order, an equitable adjustment shall be made (i) in the contract price or time of performance, or both, and (ii) in such provisions of the contract as may be so affected, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within thirty (30) days from the date of receipt by the Contractor of the notification of change; Provided, however, That the Contracting Officer, if he/she decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as a result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(End of clause)

### CLAUSE NO. 20—RETROCESSION (JUNE 1977)

(a) The Indian tribe that initially requested this contract may also request its retrocession, notwithstanding the fact that the Contractor may be a tribal organization other than the Tribe.

(b) Should the Tribe request retrocession of the contract and the Contractor is other than the Tribe, the Contracting Officer will notify the Contractor of the request and in consultation with the Tribe and the Contractor establish the effective date of the retrocession. The retrocession will become effective no later than 120 days after the Contracting Officer receives the Tribe's request unless the Tribe and the Contracting Officer mutually agree on a later date.

(c) Immediately after receipt of the request for retrocession and where applicable notifying the Contractor, the Contracting Officer will meet with the Contractor and, where applicable, the tribal governing body or bodies mutually agree to:

- (1) A plan for the orderly transfer of responsibilities;
- (2) A plan for inventorying materials and supplies on hand;
- (3) An accounting for funds, including but not limited to current and anticipated obligations;
- (4) The cost of operation until retrocession; and,
- (5) The identification of all records relating to the contract and the contracted function.

(End of clause)

### CLAUSE NO. 21—ASSUMPTION AND REASSUMPTION OF CONTRACT PROGRAMS (JUNE 1977)

(a) When the Contracting Officer determines that the performance of a Contractor under these regulations involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any person, or (2) gross negligence or the mismanagement in the handling or use of funds under the contract, the Contracting Officer will, in writing, notify the Contractor of such determination and will request that the Contractor take such corrective action within such period of time as the Secretary may prescribe.

(b) When the Director or his/her delegate determines that a Contractor has not taken corrective action (as prescribed by him/her under paragraph (a) of this section) to his/her satisfaction, he/she may, after the Contractor has been provided an opportunity for a hearing in accordance with paragraph (c) of this section, rescind the contract in whole or in part and, if he/she deems it appropriate, assume or resume control or operation of the program, activity, or service involved.

(c)(1) When the Director or his/her delegate has made a determination described in paragraph (b) of this section, he/she shall in writing notify the Contractor of such determination and of the Contractor's right to request a review of such determination and of the determination described in paragraph (a) of

this section. Such notification by the Director or his/her delegate shall set forth the reasons for the determination in sufficient detail to enable the Contractor to respond and shall inform the Contractor of its rights to a hearing on the record before a Contract Appeals Board described in paragraph (d) of this section. Upon the request of the Contractor for a hearing, the Board, established pursuant to paragraph (d) of this section, shall in writing within 10 days of the establishment notify the Contractor of the time, place and date of the hearing which will be held not later than 45 days after the request for a hearing.

(2) Where the Director or his/her delegate determines that a Contractor's performance under a contract awarded under this subpart poses an immediate threat to the safety of any person, he/she may immediately rescind the contract in whole or in part and, if he/she deems it appropriate, assume or resume control or operation of the program, activity, or service involved. Upon such a decision he/she will immediately notify the Contractor of such action and the basis therefor; and offer the Contractor an opportunity for a hearing on the record before the Contract Appeals Board established pursuant to paragraph (d) of this section to be held within 10 days of each action.

(d)(1) The Contract Appeals Board shall be composed of 3 persons appointed by the Director, Indian Health Service. Such persons may not be selected from the immediate office of any person participating in the determinations at issue. The Board shall afford the Contractor the right:

- (i) To notice of the issues to be considered;
- (ii) To be represented by counsel;
- (iii) To present witnesses on contractor's behalf;
- (iv) To cross-examine other witnesses either orally or through written interrogation; and
- (v) To compel the appearance of Indian Health Service personnel or to take depositions of such persons at reasonable times and places.

(2) The Contract Appeals Board shall make an initial written decision which shall become final within 20 days unless the Director, Indian Health Service or his/her representative modifies or reverses the decision. Any such decision by the Director of the Indian Health Service or his/her representative shall be in writing, shall be specific as to the reasons for such decision, and shall be considered final.

(3) Where Board is considering issues arising under paragraph (2) of this section, the Board shall within 25 days after the conclusion of the hearing, notify all parties in writing of its decision.

(e) In any case where the officer has rescinded a contract under paragraphs (b) or (c) of this section, he/she may decline to

enter into a new contract agreement with the Contractor until such time as he/she is satisfied that the basis for the rescission has been corrected.

Nothing in this section shall be construed as contravening the Occupational Safety and Health Act of 1970 (84 Stat. 1590), as amended (29 U.S.C. 651).

(End of clause)

CLAUSE NO. 22—PAYMENT OF INTEREST ON  
CONTRACTORS' CLAIMS (JUNE 1977)

(a) If an appeal is filed by the Contractor from a final decision of the Contracting Officer under the Disputes clause of this contract, denying a claim arising under the contract, simple interest on the amount of the claim finally determined owed by the Government shall be payable to the Contractor. Such interest shall be at the rate determined by the Secretary of the Treasury pursuant to Public Law 92-41, 85 Stat. 97, from the date the Contractor furnished to the Contracting Officer his written appeal under the Disputes clause of this contract, to the date of (1) a final judgment by a court of competent jurisdiction, or (2) mailing to the Contractor of a supplemental agreement for execution either confirming completed negotiations between the parties or carrying out a decision of a board of contract appeals.

(b) Notwithstanding (a), above, (1) interest shall be applied only from the date payment was due, if such date is later than the filing of appeal, and (2) interest shall not be paid for any period of time that the Contracting Officer determines the Contractor has unduly delayed in pursuing its remedies before a board of contract appeals or a court of competent jurisdiction.

(End of clause)

CLAUSE NO. 23—GOVERNMENT-FURNISHED  
PROPERTY (JUNE 1977)

(a) The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described elsewhere in this contract, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (hereinafter referred to as "Government-Furnished Property"). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-Furnished Property suitable for use will be delivered to the Contractor at the times stated elsewhere in this contract or, if not so stated, in sufficient time to enable the Contractor by such time or times, to meet such delivery or performance dates. In the event that Government-Furnished Property is not delivered to

the Contractor to meet such delivery or performance dates, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay occasioned the Contractor and shall equitably adjust the delivery or performance dates, or the contract price, or both, and any other contractual provision affected by the delay. In the event that Government-Furnished Property is received by the Contractor in a condition not suitable for its intended use, the Contractor shall, upon receipt thereof, notify the Contracting Officer of such fact and, as directed by the Contracting Officer, either (1) return such property at the Government's expense or otherwise dispose of such property, or (2) effect repairs or modifications. Upon completion of (1) or (2) above, the Contracting Officer upon timely written request of the Contractor shall equitably adjust the delivery or performance dates of the contract price, or both, and any other contractual provision effected by the return, disposition, repair, or modification. The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government-Furnished Property or delivery of such property in a condition not suitable for its intended use.

(b) By notice in writing the Contracting Officer may decrease the property furnished or to be furnished by the Government under this contract. In any such case, the Contracting Officer upon timely written request of the Contractor shall equitably adjust the delivery or performance date or the contract price, or both, and any other contractual provisions affected by the decrease.

(c) Title to the Government-Furnished Property shall remain in the Government. Title to Government-Furnished Property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government-Furnished Property, or any part thereof, be or become a fixture or lose its identity as personality by reason of affixation to any realty.

(d) The Government-Furnished Property, unless otherwise specifically provided herein, and except as otherwise approved or directed by the Contracting Officer in writing, shall be used exclusively for the performance of this contract.

(e) The Contractor shall maintain and administer, in accordance with sound business practice, a program for the maintenance, repair, protection and preservation of Government-Furnished Property, until disposed of by the Contractor in accordance with this clause. In the event that any damage occurs to Government-Furnished Property the risk of which has been assumed by the Government under this contract, the Government shall replace such items or the Contractor

shall make such repair of the property, as the Government directs; Provided, however, That if the Contractor cannot effect such repair within the time required, the Contractor may reject such property. The contract price includes no compensation to the Contractor for the performance of any repair or replacement for which the Government is responsible; and an equitable adjustment will be made in the contract price for any such repair or replacement of Government-Furnished Property made at the direction of the Government. Any repair or replacement for which the Contractor is responsible under the provisions of this contract shall be accomplished by the Contractor at its own expense.

(f) The Contractor also agrees to maintain and administer, in accordance with sound business practice, a property control system which will provide the following: Contract number; nomenclature of item; quantity received; issued; and balance on hand; posting reference to include date received, issued unit price and location; marking or identification of item; adequate maintenance, storage, and security of Government-Furnished Property, until disposed of by the Contractor in accordance with this clause. The Contractor further agrees to receipt promptly for all Government property in a form and manner as prescribed by the Contracting Officer.

(g) The Contractor agrees to make available to authorized representatives of the Contracting Officer at all reasonable times at the office of the Contractor all of its property records under this contract, and access to any premises where any of the Government-Furnished Property is located.

(h) (i) The Contractor shall not be liable for any loss or damage to the Government-Furnished Property, or for expenses incidental to such loss or damage except that the Contractor shall be liable for any such loss or damage (including expenses incidental thereto):

(A) Which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of its managers, superintendents, or other equivalent representatives who have supervision or direction of all or substantially all of the Contractor's business, or all or substantially all of the Contractor's operations at any one plant, laboratory, or separate location in which this contract is being performed; or

(B) Which results from a failure on the part of the Contractor, due to the willful misconduct or lack of good faith on the part of any of its directors, officers, or other representatives mentioned in subparagraph (A) above, to maintain and administer, in accordance with sound business practice, the program for maintenance, repair, protection and preservation of Government-Furnished

Property as required by subparagraph (e) above; or

(C) For which the Contractor is otherwise responsible under the express terms of the clause or clauses designated in this contract; or

(D) Which results from a risk expressly required to be insured under some other provision of this contract, or of the schedules or task orders thereunder, but only to the extent of the insurance so required to be procured and maintained or to the extent of insurance actually procured and maintained, whichever is greater; or

(E) Which results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed but only to the extent of such insurance or reimbursement; Provided, That, if more than one of the above exceptions shall be applicable in any case, the Contractor's liability under any one exception shall not be limited by any other exception.

(ii) The Contractor represents that it is not including the price hereunder, and agrees that it will not hereafter include in any price to the Government, any charge or reserve for insurance (including self-insurance funds or reserves) covering loss or destruction of or damage to the Government-Furnished Property, except the extent that the risk of loss is imposed on the Contractor under (i)(C) above, or insurance has been required under (i)(D) above.

(iii) Upon the happening of loss or destruction of or damage to any Government-Furnished Property, the Contractor shall notify the Contracting Officer thereof and shall take all reasonable steps to protect the Government-Furnished Property from further damage, separate the damaged and undamaged Government-Furnished Property in the best possible order, and furnish to the Contracting Officer a statement of:

(A) The lost, destroyed and damaged Government-Furnished Property;

(B) The time and origin of the loss, destruction or damage;

(C) All known interest in commingled property of which the Government-Furnished Property is a part; and

(D) The insurance, if any, covering any part of or interest in such commingled property.

The Contractor shall be reimbursed for the expenditures made by it in performing its obligations under the subparagraph (iii), to the extent approved by the Contracting Officer and set forth in a supplemental agreement or amendment to this contract.

(iv) With the prior written approval of the Contracting Officer after loss or destruction of or damage to Government-Furnished Property, and subject to such conditions and limitations as may be imposed by the Contracting Officer, the Contractor may, in order to minimize the loss to the Govern-

ment or in order to permit resumption of business or the like, sell for the account of the Government any item of Government-Furnished Property which has been damaged beyond practicable repair, or which is so commingled or combined with property of other, including the Contractor, that separation is impracticable.

(v) Except to the extent of any loss or destruction of or damage to Government-Furnished Property for which the Contractor is relieved of liability under the foregoing provisions of this clause, and except for reasonable wear and tear or depreciation, or the utilization of the Government-Furnished Property in accordance with the provisions of this contract, the Government-Furnished Property (other than property permitted to be sold) shall be returned to the Government in as good condition as when received by the Contractor in connection with this contract, or as repaired under paragraph (e) above.

(vi) In the event the Contractor is reimbursed or compensated for any loss or destruction of or damage to the Government-Furnished Property, it shall equitably reimburse the Government. The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any such loss, destruction or damage and, upon the request of the Contracting Officer shall at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including assistance in the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery.

(i) Upon completion or expiration of this contract, any Government property which has not been consumed in the performance of this contract or which has not been previously disposed of in accordance with the provisions of this clause, or for which the Contractor has not otherwise been relieved of responsibility, shall be disposed of as the Contracting Officer may direct. The Contractor shall in no way be relieved of responsibility for Government property without the prior written approval of the Contracting Officer.

(j) If the Contracting Officer determines that the interests of the Government require removal of any Government-Furnished Property, or if the Contractor determines any Government-Furnished Property to be in excess of its need under this contract such Government-Furnished Property shall be disposed of in the same manner as covered by paragraph (i) above. In the event that the Contracting Officer requires the removal of any Government-Furnished Property under this paragraph (j) or paragraph (i) above, upon timely written request of the Contractor, an equitable adjustment shall be made in the contract price to cover the direct cost to the Contractor of such removal and of any property damage occasioned thereby.

## Appendix A—Public Health Services

PHS 352.280-4

(End of clause)

### CLAUSE NO. 24—EXAMINATION OF RECORDS BY THE COMPTROLLER GENERAL (JUNE 1977)

(a) The Contractor agrees that the Comptroller General of the United States or any of his/her duly authorized representatives shall, until expiration of 3 years after final payment under this contract, or of the time periods for the particular records specified in Part 1-20 of the Federal Procurement Regulations (41 CFR Part 1-20), whichever expires earlier, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.

(b) The Contractor further agrees to include in all its subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his/her duly authorized representatives shall, until expiration of 3 years after final payment under the subcontract, or of the time periods for the particular records specified in Part 1-20 of the Federal Procurement Regulations (41 CFR Part 1-20), whichever expires earlier, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (1) purchase orders not exceeding \$2,500 and (2) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

(End of clause)

### CLAUSE NO. 25—INDEMNITY AND INSURANCE (JUNE 1977)

(a) The Contractor shall indemnify and save and keep harmless the Government against any or all loss, cost, damage, claim, expense or liability whatsoever, because of accident or injury to persons or property or others occurring in connection with any program including as a part of this contract, by providing where applicable, the insurance described below:

(b) The Contractor shall secure, pay the premium for, and keep in force until the expiration of this contract, or any renewal period thereof, insurance as provided below. Such insurance policies shall specifically include a provision stating the liability assumed by the Contractor under this contract.

(1) Workman's compensation insurance as required by laws of the state.

(2) Owner's, landlord's, and tenant's bodily injury liability insurance with limits of not less than \$50,000 for each person and \$500,000 for each accident.

(3) Property damage liability insurance with limits of not less than \$25,000 for each accident.

(4) Automobile bodily injury liability insurance with limits of not less than \$50,000 for each person, and \$500,000 for each accident and property damage liability insurance with a limit of not less than \$5,000 for each accident.

(5) Food products liability insurance with limits of not less than \$50,000 for each person and \$500,000 for each accident.

(6) Professional malpractice insurance where medical, dental, or other health professional services are involved.

(7) Other liability insurance not specifically mentioned when required.

(c) Each policy of insurance shall contain an endorsement providing that cancellation by the insurance company shall not be effective unless a copy of the cancellation is mailed (registered) to the Contracting Officer 30 days prior to the effective date of cancellation.

(d) A certificate of each policy of insurance, and any change therein, shall be furnished to the Contracting Officer immediately upon receipt from the insurance company.

(e) Insurance companies of the Contractor shall be satisfactory to the Contracting Officer. When in his/her opinion an insurance company is not satisfactory for reasons that will be stated, the Contractor shall provide insurance through companies that are satisfactory to the Contracting Officer.

(f) Each policy of insurance shall contain a provision that the insurance carrier waives any rights it may have to raise as a defense the tribe's sovereign immunity from suit, but such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy of insurance. The policy shall contain no provision, either expressed or implied, that will serve to authorize or empower the insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy or insurance.

(End of clause)

### CLAUSE NO. 26—FAIR AND EQUAL TREATMENT OF INDIAN PEOPLE (JUNE 1977)

(a) The Contractor agrees to make no discriminatory distinctions among Indian patients or beneficiaries of this contract. For the purpose of this contract discriminatory distinctions include but are not limited to the following:

(i) Denying a patient any service or benefit or availability of a facility;

(ii) Providing any service or benefit to a patient which is different, or is provided in a different manner or at a different time from that provided to other patients under this

contract; subjecting a patient to segregation or separate treatment in any manner related to his/her receipt of any service; restricting a patient in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service or benefit; treating a patient differently from others in determining whether he/she satisfies any admission, enrollment, quota, eligibility membership, or other requirements or conditions which individuals must meet in order to be provided any service or benefit; the assignment of times or places for the provision of services on the basis of discriminatory distinctions which may be made of the patients to be served.

(b) The Government reserves the right to terminate this contract in whole or in part whenever the Contractor fails to comply with the requirements of this clause.

(End of clause)

CLAUSE NO. 27—REPORTS TO THE INDIAN PEOPLE AND ANNUAL REPORTS (JUNE 1977)

(a) The Contractor, as a recipient of Federal financial assistance, shall make reports and information available to the Indian people serviced or represented by the Contractor. Such reports will reflect how the Federal assistance funds were utilized to the benefit of the Indian people served or represented as follows: (specific reporting requirements, formats and methods of distribution to the Indian people will be prescribed in the scope of the contract.)

(b) *Annual reports.*

(1) For each fiscal year during which a tribal organization receives or expends funds pursuant to the contract under this Part, the tribe which requested the contract must submit a report to the Contracting Officer. The report shall include, but not be limited to, an accounting of the amounts and purposes for which the contract funds were expended and information on the conduct of the program or services involved. The report shall include any other information requested by the Contracting Officer and may be submitted as follows:

(i) When the contract is with the governing body of an Indian tribe, the tribe shall submit the reports to the Contracting Officer.

(ii) When the contract is with a tribal organization other than the governing body of the tribe, the tribe has the option of having the tribal organization prepare the report and submit it to the tribe for review and approval before the tribe submits it to the Contracting Officer.

(iii) When the contract benefits more than one tribe, the tribal organization shall prepare and submit the report to each of the tribes benefiting under the contract. Each tribe shall endorse the report before submitting it to the Contracting Officer.

(2) The annual report shall be submitted to the Contracting Officer within 90 days of the end of the fiscal year in which the contract was performed. However, the period for submitting the report may be extended if there is just cause for such extension.

(3) In addition to the yearly reporting requirement given in paragraphs (a) and (b) of this section, the tribal contractor shall furnish other reports when and as required by the Secretary.

(End of clause)

CLAUSE NO. 28—QUESTIONNAIRES AND SURVEYS (JUNE 1977)

In the event the performance of this contract involves the collection of information upon identical items from 10 or more persons, other than Federal employees, the Contractor shall obtain written approval from the Contracting Officer, prior to the use thereof, of any forms, schedules, questionnaires, survey plans or other documents, and any revisions thereto, intended to be used in such collection.

(End of clause)

CLAUSE NO. 29—PRINTING (JUNE 1977)

Unless otherwise specified in this contract, the Contractor shall not engage in, nor subcontract for, any printing (as that term is defined in Title 1 of the Government Printing and Binding Regulations in effect on the effective date of this contract) in connection with the performance of work under this contract: Provided, however, That performance of a requirement under this contract involving the reproduction of less than 5,000 production units of any one page, or less than 25,000 production units in the aggregate of multiple pages, will not be deemed to be printing. A production unit is defined as one sheet, size 8 by 10 and ½ inches, one side only, one color.

(End of clause)

CLAUSE NO. 30—PRICE REDUCTION FOR DEFECTIVE COST OR PRICING

The following clause applies to all contracts where cost and pricing data is required in accordance with P.L. 87-653.

*Price Reduction for Defective Cost or Pricing Data (June 1977)*

(a) If the Contracting Officer determines that any price negotiated in connection with this contract or any cost reimbursable under this contract was increased by any significant sums because the Contractor, or any subcontractor pursuant to the clause of this contract entitled "Subcontractor Cost, or Pricing Data" or "Subcontractor Cost or Pricing Data—Price Adjustments," or any

subcontract clause therein required, furnished incomplete or inaccurate cost or pricing data or data not current as certified in its Contractor's Certificate of Current Cost or Pricing Data, then such price or cost shall be reduced accordingly and the contract shall be modified in writing to reflect such reduction.

(b) Failure to agree on a reduction shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause of this contract.

(NOTE: Since the contract is subject to reduction under this clause by reason of defective cost or pricing data submitted in connection with certain subcontracts, it is expected that the Contractor may wish to include a clause in each such subcontract requiring the subcontractor to appropriately indemnify the Contractor. It is also expected that any subcontractor subject to such indemnification will generally require substantially similar indemnification for defective cost or pricing data required to be submitted by its lower tier subcontractors).

(End of clause)

#### CLAUSE NO. 31—SUBCONTRACTOR COST AND PRICING DATA

The following clause should be included in all contracts when the subcontracts of the type and size described therein are contemplated.

##### *Subcontractor Cost and Pricing Data (June 1977)*

(a) The Contractor shall require subcontractors hereunder to submit in writing cost or pricing data under the following circumstances:

(1) Prior to award of any cost-reimbursed type, time and material, labor-hour, incentive, or price redeterminable subcontract the price of which is expected to exceed \$100,000; and

(2) Prior to the award of any other subcontract, the price of which is expected to exceed \$100,000, or to the pricing of any subcontract change or other modification for which the price adjustment is expected to exceed \$100,000, where the price or price adjustment is not based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(b) The Contractor shall require subcontractors to certify, substantially the same form as that used in the certificate by the Prime Contractor to the Government, that, to the best of their knowledge and belief, the cost and pricing data submitted under (a) above are accurate, complete, and current as of the date of the execution, which date shall be as close as possible to the date of agreement on the negotiated

price of the subcontract or subcontract change or modification.

(c) The contractor shall insert the substance of this clause including this paragraph (c) in each of its cost-reimbursement type, time and material, labor-hour, price redeterminable, or incentive subcontracts hereunder, and in any other subcontract hereunder which exceeds \$100,000 unless the price thereof is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. In each such excepted subcontract hereunder which exceeds \$100,000, the Contractor shall insert the substance of the following clause:

##### *Subcontractor Cost and Pricing Data—Price Adjustment*

(a) Paragraphs (b) and (c) of this clause shall become operative only with respect to any change or other modification made pursuant to one or more provisions of this contract which involves a price adjustment in excess of \$100,000. The requirements of this clause shall be limited to such price adjustments.

(b) The Contractor shall require subcontractors hereunder to submit cost or pricing data under the following circumstances:

(1) Prior to award of any cost-reimbursement type, time and material, labor-hour, incentive, or price redeterminable subcontract, the price of which is expected to exceed \$100,000; and

(2) Prior to award of any other subcontract, the price of which is expected to exceed \$100,000, or to the pricing of any subcontract change or other modification for which the price adjustment is expected to exceed \$100,000, where the price or price adjustment is not based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(c) The Contractor shall require subcontractors to certify, in substantially the same form as that used in the Certificate by the Prime Contractor to the Government, that, to the best of their knowledge and belief, the cost and pricing data submitted under (b) above are accurate, complete, and current as of the date of the execution, which date shall be as close as possible to the date of agreement on the negotiated price of the contract modification.

(d) The Contractor shall insert the substance of this clause including this paragraph (d) in each subcontract hereunder which exceeds \$100,000.

(End of clause)

## CLAUSE NO. 32—ADVANCE PAYMENT (JUNE 1977)

(a) *Amount of Advance.* At the request of the Contractor, and subject to the conditions hereinafter set forth, the Government shall make an advance payment, or advance payments from time to time, to the Contractor. No advance payment shall be made (1) without the approval of the office administering advance payments (hereinafter called the "Administering Office" and designated in paragraph (k)(4) hereof) as with all advance payments theretofore made, shall exceed the amount stated in paragraph (k)(1) hereof; and (3) without a properly certified invoice or invoices.

(b) *Special Bank Account.* Until all advance payments made hereunder are liquidated and the Administering Office approves in writing the release of any funds due and payable to the Contractor, all advance payments and all other payments under the contract shall be made by check payable to the Contractor, and be marked for deposit only in a Special Bank Account with the bank designated in paragraph (k)(2) hereof. No part of the funds in the Special Bank Account shall be mingled with other funds of the Contractor prior to withdrawal thereof from the Special Bank Account as hereinafter provided. Except as hereinafter provided, each withdrawal shall be made only by check of the Contractor countersigned on behalf of the Government by the Contracting Officer or such other person or persons as he/she may designate in writing (hereinafter called the "Countersigning Agent"). Until otherwise determined by the Administering Office, countersignature on behalf of the Government will not be required.

(c) *Use of Funds.* The funds in the Special Bank Account may be withdrawn by the Contractor solely for the purpose of making payments for items of allowable cost or to reimburse the Contractor for such items of allowable cost, and or such other purposes as the Administering Office may approve in writing. Any interpretation required as to the proper use of funds shall be made in writing by the Administering Office.

(d) *Return of Funds.* The Contractor may at any time repay all or any part of the funds advanced hereunder. Whenever so requested in writing by the Administering Office, the Contractor shall repay to the Government such part of the unliquidated balance of advance payments as shall in the opinion of the Administering Office be in excess of current requirements, or (when added to total advance previously made and liquidated) in excess of the amount specified in paragraph (k)(1) hereof. In the event the Contractor fails to repay such part of the unliquidated balance of advance payments when so requested by the Administering Office, all or any part thereof may be withdrawn from the

Special Bank Account by checks payable to the Treasurer of the United States signed solely by the Countersigning Agent and applied in reduction of advance payments then outstanding hereunder.

(e) *Liquidation.* If not otherwise liquidated, the advance payments made hereunder shall be liquidated as herein provided. When the sum of all payments under this contract, other than advance payments, plus the unliquidated amount of advance payments are equal to the total estimated cost for the work under this contract or such lesser amount to which the total estimated cost under this contract may have been reduced, plus increases, if any, in this total estimated cost not exceeding, in the aggregate (including, without limitation, reimbursable costs incident to termination for cause and retrocession as estimated by the Contracting Officer), the Government shall thereafter withhold further payments to the Contractor and apply the amounts withheld against the Contractor's obligation to repay such advance payments until such advance payments shall have been fully liquidated. If upon completion, termination, or retrocession of the contract all advance payments have not been fully liquidated, the balances therefor shall be deducted from any sums otherwise due or which may become due to the Contractor from the Government, and any deficiency shall be paid by the Contractor to the government upon demand.

(f) *Bank Agreement.* Before an advance payment is made hereunder, the Contractor shall transmit to the Administering Office, in the form prescribed by such office, an Agreement in triplicate from the bank in which the Special Bank Account is established, clearly setting forth the special character of the account and the responsibilities of the bank thereunder. Wherever possible, such bank shall be a member bank of the Federal Reserve System, or an "insured" bank within the meaning of the Act creating the Federal Deposit Insurance Corporation Act of August 23, 1935, 49 Stat. 685, as amended (12 U.S.C. 264).

(g) *Lien on Special Bank Account.* The Government shall have a lien upon any balance in the Special Bank Account paramount to all other items, which lien shall secure the repayment or any advance payments made hereunder.

(h) *Lien on Property under Contract.* Any and all advance payments made under this contract shall be secured, when made, by a lien in favor of the Government, paramount to all other liens, upon the supplies or other things covered by this contract and on all material and other property acquired for or allocated to the performance of this contract, except to the extent that the Government by virtue of any other provision of this contract, or otherwise, shall have valid title

to such supplies, materials, or other property as against other creditors of the Contractor. The Contractor shall identify, by marking or segregation, all property which is subject to a lien in favor of the Government by virtue of any provision of this contract in such a way as to indicate that it is subject to such lien and that it has been acquired for or allocated to the performance of this contract. If for any reason such supplies, materials, or other property are not identified by marking or segregation, the Government shall be deemed to have a lien to the extent of the Government's interest under this contract on any mass of property with which such supplies, materials, or other property are commingled. The Contractor shall maintain adequate accounting control over such property on its books and records. If at any time during the progress of the work on the contract it becomes necessary to deliver any item or items and materials upon which the Government has a lien as aforesaid to a third person, the Contractor shall notify such third person of the lien herein provided and shall obtain from such third person a receipt, in duplicate, acknowledging, *inter alia* the existence of such lien. A copy of each receipt shall be delivered by the Contractor to the Contracting Officer. If this contract is terminated in whole or in part and the Contractor is authorized to sell or retain termination inventory acquired for or allocated to this contract, such sale or retention shall be made only if approved by the Contracting Officer, which approval shall constitute a release of the Government's lien hereunder to the extent that such termination inventory is sold or retained, and to the extent that the proceeds of the sale, or the credit allowed for such retention on the Contractor's termination claim, is applied in reduction of advance payments then outstanding hereunder.

(i) *Insurance.* The Contractor represents and warrants that it is now maintaining with responsible insurance carriers, (1) insurance upon its own plant and equipment against fire and other hazards to the extent that like properties are usually insured by other operating plants and properties of similar character in the same general locality; (2) adequate insurance against liability on account of damage to persons or property; and (3) adequate insurance under all applicable workmen's compensation laws. The Contractor agrees that, until work under this contract has been completed and all advance payments made hereunder have been liquidated, it will (i) maintain such insurance; (ii) maintain adequate insurance upon any materials, parts, assemblies, subassemblies, supplies, equipment and other property acquired for or allocable to this contract and subject to the Government lien hereunder; and (iii) furnish such certificates with re-

spect to its insurance as the Administering Office may from time to time require.

(j) *Prohibition against Assignment.* Notwithstanding any other provision of this contract, the Contractor shall not transfer, pledge, or otherwise assign this contract, or any interest therein, or any claim arising thereunder, to any party or parties, bank, trust company, or other financing institution.

(k) *Designations and Determinations.* (1) *Amount.* The amount of advance payments at any time outstanding hereunder shall not exceed \$——.

(2) *Depository.* The bank designated for the deposit of payments made hereunder shall be:

(3) *Interest Charge.* No interest shall be charged for advance payments made hereunder. The Contractor shall charge interest at the rate of 6 percent per annum on subadvances or down payments to subcontractors, and such interest will be credited to the account of the Government. However, interest need not be charged on subadvances on nonprofit subcontracts with nonprofit educational or research institutions for experimental, research or development work.

(4) *Administering Office.* The office administering advance payments shall be the office designated as having responsibility for awarding the contract.

(l) *Other Security.* The terms of this contract shall be considered adequate security for advance payments hereunder, except that if at any time the administering office deems the security furnished by the Contractor to be inadequate, the Contractor shall furnish such additional security as may be satisfactory to the administering office, to the extent that such additional security is available.

(End of clause)

CLAUSE NO. 33—EFFECT ON EXISTING RIGHTS  
(JUNE 1977)

(a) Nothing in this contract shall be construed as:

(1) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity for suit enjoyed by an Indian tribe; or

(2) Authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

(End of clause)

CLAUSE NO. 34—FEDERAL, STATE, AND LOCAL TAXES (JUNE 1977)

(a) Except as may be otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties.

(b) Nevertheless, with respect to any Federal excise tax or duty on the transactions or

property covered by this contract, if a statute, court decision, written ruling, or regulation takes effect after the contract date, and (1) Results in the Contractor being required to pay or bear the burden of any such Federal excise tax or duty or increase in the rate thereof which would not otherwise have been payable on such transactions or property, the contract price shall be increased by the amount of such tax or duty or rate increase; Provided, That the Contractor if requested by the Contracting Officer, warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price as a contingency reserve or otherwise; or

(2) Results in the Contractor not being required to pay or bear the burden of, or in its obtaining a refund or drawback of, any such Federal excise tax or duty which would otherwise have been payable on such transactions or property or which was the basis of an increase in the contract price, the contract price shall be decreased by the amount of the relief, refund, or drawback, or the amount shall be paid to the Government, as directed by the Contracting Officer. The contract price shall be similarly decreased if the Contractor, through its fault or negligence or its failure to follow instructions of the Contracting Officer, is required to pay or bear the burden of, or does not obtain, a refund or drawback of, any such Federal excise tax or duty.

(c) No adjustment pursuant to paragraph (b) above will be made under this contract unless the aggregate amount thereof is or may reasonably be expected to be over \$100.

(d) As used in paragraph (b) above, the term "contract date" means the date set for the bid opening, or if this is a negotiated contract, the date of this contract. As to additional supplies or services procured by modification to this contract, the term "contract date" means the date of such modification.

(e) Unless there does not exist any reasonable basis to sustain an exemption, the Government, upon request of the Contractor, without further liability, agrees, except as otherwise provided in this contract, to furnish evidence appropriate to establish exemption from any tax which the Contractor warrants in writing was excluded from the contract price. In addition, the Contracting Officer may furnish evidence to establish exemption from any tax that may, pursuant to this clause, give rise to either an increase or decrease in the contract price. Except as otherwise provided in this contract, evidence appropriate to establish exemption from duties will be furnished only at the direction of the Contracting Officer.

(f) The Contractor shall promptly notify the Contracting Officer of matters which will result in either an increase or decrease in the contract price, and shall take action

with respect thereto as directed by the Contracting Officer.

(End of clause)

[49 FR 36242, Sept. 14, 1984, as amended at 51 FR 20491, June 5, 1986]

**PHS 352.280-6 Demurrage charge provisions for reusable cylinders and containers.**

The clause set forth below shall be inserted in solicitations and resultant contracts when delivery of the items may be in contractor-furnished reusable gas cylinders or other containers.

**DEMURRAGE CHARGE PROVISIONS FOR REUSABLE CYLINDERS AND CONTAINERS (APR 1984)**

(a) Reusable gas cylinders or other containers identified below by offerors shall remain the property of the Contractor (except as provided in (c) below), and will be loaned without charge to the Government for the period stipulated below. In computing the period involved, such free loan period shall commence on the first day after date of delivery of each container to the herein specified f.o.b. point(s). Offerors who specify less than \_\_\_\_\_ days (to be determined by the Contracting Officer in accordance with trade custom), shall have their offers increased for evaluation purposes only by an amount arrived at by multiplying the number of days less than the established free loan period by the daily rental charge. In the event the offeror does not specify a free loan period, such period shall be \_\_\_\_\_ days (insert the same number of days as the established free loan period). Beginning with the first day after expiration of the free loan period to and including the date the containers are delivered to the Contractor's designated carrier, the Government shall pay the Contractor demurrage (rental) in the amount specified below. No demurrage shall accrue to the Contractor in excess of the herein specified container's replacement value. For each container lost or damaged beyond repair while in the Government's possession, the Government shall pay to the Contractor the herein specified replacement value less allocable demurrage paid therefor. Such lost or damaged containers paid for by the Government shall become the property of the Government.

(b) Empty containers will be delivered to the Contractor's designated carrier (offeror to identify applicable carrier below) f.o.b. points of original delivery specified in this solicitation/contract.

## Appendix A—Public Health Services

## PHS 352.380-4

OFFERORS SHALL FURNISH THE FOLLOWING INFORMATION, AS APPLICABLE, FOR CONTAINERS

Appl- cable item No.	Type and size of container	Quan- tity	Free loan period	Demurrage charges per day per cyl- inder
Replacement value for each container		Identification and location of offeror's car- rier for return of empty container		

(c) When the offeror indicates that containers have a replacement value of less than \$10, the Government shall have the option to purchase containers and add the cost to the offered price. When purchase option is exercised, offers shall be evaluated accordingly. In this event, the container shall become the property of the Government.

(End of clause)

### Subpart PHS 352.3—Provision and Clause Matrices

#### PHS 352.380-4 Contract clauses for contracts awarded under the Indian Self-Determination Act.

(a) PHS Acquisition Regulations (PHSAR) Clauses for Cost-Reimbursement Contracts Awarded under the Indian Self-Determination Act.

*Number, PHSAR Clause No., and Title and Date of Clause*

1. 352.280-4(a)(1) Definitions. (June 1977)
2. 352.280-4(a)(2) Disputes. (June 1977)
3. 352.280-4(a)(3) Limitation of Cost. (June 1977)
4. 352.280-4(a)(4) Allowable Cost. (June 1977)
5. 352.280-4(a)(5) Negotiated Overhead Rates. (June 1977)
6. 352.280-4(a)(6) Payment (June 1977)
7. 352.280-4(a)(7) Advance Payment. (June 1977)
8. 352.280-4(a)(8) Examination of Records. (June 1977)
9. 352.280-4(a)(9) Inspection and Reports. (June 1977)
10. 352.280-4(a)(10) Subcontracting. (June 1977)
11. 352.280-4(a)(11) Accounts, Audit, and Records. (June 1977)
12. 352.280-4(a)(12) Government Property. (June 1977)
13. 352.280-4(a)(13) Changes. (June 1977)
14. 352.280-4(a)(14) Notice to the Government of Delays. (June 1977)
15. 352.280-4(a)(15) Retrocession. (June 1977)

16. 352.280-4(a)(16) Reassumption of Programs. (June 1977)
17. 352.280-4(a)(17) Key Personnel. (June 1977)
18. 352.280-4(a)(18) Litigation and Claims. (June 1977)
19. 352.280-4(a)(19) Indemnity and Insurance. (June 1977)
20. 352.280-4(a)(20) Overtime. (June 1977)
21. 352.280-4(a)(21) Foreign Travel. (June 1977)
22. 352.280-4(a)(22) Questionnaires and Surveys. (June 1977)
23. 352.280-4(a)(23) Printing. (June 1977)
24. 352.280-4(a)(24) Services of Consultants. (June 1977)
25. 352.280-4(a)(25) Assignment of Claims. (June 1977)
26. 352.280-4(a)(26) Contract Work Hours and Safety Standards Act-Overtime Compensation. (June 1977)
27. 352.280-4(a)(27) Walsh-Healey Public Contracts Act. (June 1977)
28. 352.280-4(a)(28) Equal Opportunity. (June 1977)
29. 352.280-4(a)(29) Indian Preference in Training and Employment. (June 1977)
30. 352.280-4(a)(30) Certificate of Nonsegregated Facilities. (June 1977)
31. 352.280-4(a)(31) Convict Labor. (June 1977)
32. 352.280-4(a)(32) Officials not to Benefit. (June 1977)
33. 352.280-4(a)(33) Buy American Act Supply and Service contracts. (June 1977)
34. 352.280-4(a)(34) Anti-Kickback Act. (June 1977)
35. 352.280-4(a)(35) Use of Indian Business Concerns. (June 1977)
36. 352.280-4(a)(36) Payment of Interest on Contractors' Claims. (June 1977)
37. 352.280-4(a)(37) Fair and Equal Treatment of Indian People. (June 1977)
38. 352.280-4(a)(38) Price Reduction for Defective Cost or Pricing Data. (June 1977)
39. 352.280-4(a)(39) Subcontractor Cost and Pricing Data. (June 1977)
40. 352.280-4(a)(40) Penalties. (June 1977)
41. 352.280-4(a)(41) Effect on Existing Rights. (June 1977)
42. 352.280-4(a)(42) General Services Administration Supply Sources. (June 1977)

(b) PHSAR Clauses for Fixed-Price Contracts Awarded under the Indian Self-Determination Act.

*Number, PHSAR Clause No. and Title and Date of Clause*

1. 352.280-4(b)(1) Definitions. (June 1977)
2. 352.280-4(b)(2) Disputes. (June 1977)
3. 352.280-4(b)(3) Contract Work Hours and Safety Standards Act-Overtime Compensation. (June 1977)
4. 352.280-4(b)(4) Walsh-Healey Public Contracts Act. (June 1977)
5. 352.280-4(b)(5) Convict Labor. (June 1977)

**PHS 352.380-4**

6. 352.280-4(b)(6) Notice to the Government of Delays. (June 1977)
7. 352.280-4(b)(7) Assignment of Claims. (June 1977)
8. 352.280-4(b)(8) Officials not to Benefit. (June 1977)
9. 352.280-4(b)(9) Anti-Kickback Act. (June 1977)
10. 352.280-4(b)(10) Penalties. (June 1977)
11. 352.280-4(b)(11) Buy American Act. (June 1977)
12. 352.280-4(b)(12) Equal Opportunity. (June 1977)
13. 352.280-4(b)(13) Certificate of Nonsegregated Facilities. (June 1977)
14. 352.280-4(b)(14) Subcontracting. (June 1977)
15. 352.280-4(b)(15) Competition in Subcontracting. (June 1977)
16. 352.280-4(b)(16) Use of Indian Business Concerns. (June 1977)
17. 352.280-4(b)(17) Indian Preference in Training and Employment. (June 1977)
18. 352.280-4(b)(18) Inspection. (June 1977)
19. 352.280-4(b)(19) Changes. (June 1977)
20. 352.280-4(b)(20) Retrocession. (June 1977)

**48 CFR Ch. 3 (10-1-97 Edition)**

21. 352.280-4(b)(21) Assumption and Reassumption of Contract Programs. (June 1977)
22. 352.280-4(b)(22) Payment of Interest on Contractor's Claims. (June 1977)
23. 352.280-4(b)(23) Government-Furnished Property. (June 1977)
24. 352.280-4(b)(24) Examination of Records by the Comptroller General. (June 1977)
25. 352.280-4(b)(25) Indemnity and Insurance. (June 1977)
26. 352.280-4(b)(26) Fair and Equal Treatment of Indian People. (June 1977)
27. 352.280-4(b)(27) Reports to the Indian People and Annual Reports. (June 1977)
28. 352.280-4(b)(28) Questionnaires and Surveys. (June 1977)
29. 352.280-4(b)(29) Printing. (June 1977)
30. 352.280-4(b)(30) Price Reduction for Defective Cost or Pricing. (June 1977)
31. 352.280-4(b)(31) Subcontractor Cost and Pricing Data. (June 1977)
32. 352.280-4(b)(32) Advance Payment. (June 1977)
33. 352.280-4(b)(33) Effect on Existing Rights. (June 1977)
34. 352.280-4(b)(34) Federal, State, and Local Taxes. (June 1977)

## SUBCHAPTER T—PHS SUPPLEMENTATIONS

### PART PHS 380—SPECIAL PROGRAM REQUIREMENTS AFFECTING PHS ACQUISITIONS

#### Subpart PHS 380.1—Acquisitions Involving Human Subjects

Sec.  
PHS 380.101 Applicability.  
PHS 380.102 Policy.  
PHS 380.103 Assurances.  
PHS 380.104 Notice to offerors.  
PHS 380.105 Contract clause.

#### Subpart PHS 380.2—Acquisitions Involving the Use of Laboratory Animals

PHS 380.201 Scope of subpart.  
PHS 380.202 Definitions.  
PHS 380.203 Policy.  
PHS 380.204 Applicability.  
PHS 380.205 Contractor implementation.  
PHS 380.206 PHS implementation.

#### Subpart PHS 380.3—Acquisition of Drugs and Medical Supplies

PHS 380.301 Scope of subpart.  
PHS 380.302 Acquisition of drugs.  
PHS 380.302-1 Policy.  
PHS 380.302-2 Solicitation and contract requirements.  
PHS 380.303 Acquisition of controlled drugs.  
PHS 380.304 Effectiveness of drug products.  
PHS 380.304-1 General.  
PHS 380.304-2 Policy.  
PHS 380.304-3 Procedures.  
PHS 380.304-4 Distribution of information.  
PHS 380.305 Maximum allowable cost for drugs.  
PHS 380.305-1 General.  
PHS 380.305-2 Applicability.  
PHS 380.305-3 Responsibilities.  
PHS 380.305-4 Solicitation notification.  
PHS 380.305-5 Contract requirements.  
PHS 380.306 Acquisition of tax free and specially denatured alcohol.

#### Subpart PHS 380.4—Contracts Under the Indian Self-Determination Act

PHS 380.400 Scope of subpart.  
PHS 380.401 Applicability of regulations.  
PHS 380.402 Waivers.  
PHS 380.403 Negotiating authority.  
PHS 380.404 Definitions.  
PHS 380.405 Types of contracts.  
PHS 380.406 Term of contract.  
PHS 380.407 Exemption from bonds.  
PHS 380.408 Acquisition of construction and architect-engineering service contracts.  
PHS 380.409 Performance of personal services.  
PHS 380.410 Special provisions of Indian

Self-Determination contract.  
PHS 380.411 Contract provisions.

#### Subpart PHS 380.5—Acquisitions Under the Buy Indian Act

PHS 380.500 Scope of subpart.  
PHS 380.501 Policy.  
PHS 380.502 Definitions.  
PHS 380.502-1 Indian.  
PHS 380.502-2 Indian firm.  
PHS 380.502-3 Product of Indian industry.  
PHS 380.502-4 Buy Indian contract.  
PHS 380.502-5 Buy Indian restricted advertising.  
PHS 380.503 Requirements.  
PHS 380.504 Competition.  
PHS 380.505 Responsibility determinations.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 36263, Sept. 14, 1984, unless otherwise noted.

#### Subpart PHS 380.1—Acquisitions Involving Human Subjects

SOURCE: 51 FR 20491, June 5 1986, unless otherwise noted.

##### PHS 380.101 Applicability.

This subpart applies to all research and development contracts involving human subjects except those that are exempt by Secretarial waiver under 45 CFR 46.101(e) or exempt under 45 CFR 46.101(b).

##### PHS 380.102 Policy.

(a) Safeguarding the rights and welfare of human subjects in activities under Public Health Service (PHS) research and development contracts is the responsibility of each institution that receives or is accountable to PHS for funds awarded for the conduct of that activity. To assure that this institutional responsibility is met, PHS shall not permit a nonexempt research activity involving human subjects to be undertaken unless the institution has an assurance on file with the Office for Protection from Research Risks (OPRR), NIH/PHS, and has filed a certification that an institutional review board (IRB) has reviewed and approved the activity in accordance with 45 CFR Part 46.

(b) Contracts involving human subjects will not be awarded to an individual unless he/she is affiliated with or sponsored by an institution which can and will assume responsibility for safeguarding the human subjects involved.

**PHS 380.103 Assurances.**

In accordance with 45 CFR 46.103, OPRR is responsible for negotiation of assurances covering all PHS-supported research activities involving human subjects. Consultation with OPRR (telephone: 301-496-7041) is recommended on issues regarding assurances, certification of IRB review and approval, and interpretation of the regulations for the protection of human subjects in 45 CFR Part 46.

**PHS 380.104 Notice to offerors.**

Solicitations shall contain the notice to offerors set forth in PHS 352-280-1(a) whenever contract performance is expected to involve human subjects.

**PHS 380.105 Contract clause.**

The clause set forth in PHS 352.280-1(b) shall be inserted in all contracts involving human subjects.

**Subpart PHS 380.2—Acquisitions Involving the Use of Laboratory Animals**

SOURCE: 51 FR 20492, June 5 1986, unless otherwise noted.

**PHS 380.201 Scope of subpart.**

This subpart describes Public Health Service (PHS) contracts for projects or activities involving animals, and the responsibilities of the PHS agencies and subordinate elements for implementing policies and procedures described herein.

**PHS 380.202 Definitions.**

(a) *Animal*. Any live, vertebrate animal used or intended for use in research, research training, experimentation or biological testing or for related purposes.

(b) *Animal facility*. Any building, room, area, enclosure, or vehicle, including satellite facility, used for animal confinement, transport, maintenance, breeding or experiments of sur-

gical manipulation. A satellite facility is any containment outside of a core facility or centrally designated or managed area in which animals are housed for more than 24 hours.

(c) *Animal Welfare Act*. Pub. L. 89-544, 1966, as amended (Pub. L. 91-579 and Pub. L. 94-279) 7 U.S.C. 2131 et seq. Implementing regulations are published in the Code of Federal Regulations (CFR), Title 9, Subchapter A, Parts 1, 2, 3, and 4, and are administered by the U.S. Department of Agriculture.

(d) *Animal Welfare Assurance or Assurance*. The documentation from an awardee or a prospective awardee institution assuring institutional compliance with this policy.

(e) *Guide*. *Guide for the Care and Use of Laboratory Animals*, NIH Pub. No. 85-23, 1985 edition or succeeding revised editions.

(f) *Institution*. Any public or private organization, business, or agency (including components of Federal, State and local governments).

(g) *Institutional official*. An individual who has the authority to sign the institution's Assurance, making a commitment on behalf of the institution that the requirement of this subpart will be met.

(h) *Public Health Service*. The Public Health Service includes the Office of the Assistant Secretary for Health; the Alcohol, Drug Abuse, and Mental Health Administration; the Centers for Disease Control; the Food and Drug Administration; the Health Resources and Services Administration; and the National Institutes of Health.

(i) *Quorum*. A majority of the members of the Institutional Animal Care and Use Committee.

**PHS 380.203 Policy.**

It is the policy of PHS to require institutions to establish and maintain proper measures to ensure the appropriate care and use of all animals involved in research, research training and biological testing (hereinafter referred to as activities) supported by PHS. PHS endorses the "U.S. Government Principles for the Utilization and Care of Vertebrate Animals Used in Testing, Research and Training" developed by the Interagency Research Animal Committee (IRAC). This policy is

intended to implement and supplement those Principles.

**PHS 380.204 Applicability.**

(a) This policy is applicable to all PHS-supported activities involving animals, whether the activities are performed at an awardee institution, or any other institution, in the United States, the Commonwealth of Puerto Rico, or any territory or possession of the United States. Institutions in foreign countries receiving PHS support for activities involving animals shall comply with this policy, or provide evidence to PHS that acceptable standards for the humane care and use of the animals in PHS-supported activities will be met.

(b) No PHS support for an activity involving animals will be provided to an individual unless that individual is affiliated with or sponsored by an institution which can and does assume responsibility for compliance with this policy for PHS-supported activities, or unless the individual makes other arrangements with PHS.

(c) This policy does not supercede or preempt applicable State or local laws or regulations which impose more stringent standards for the care and use of laboratory animals. All institutions are required to comply, as applicable, with the Animal Welfare Act, and other Federal statutes and regulations relating to animals.

**PHS 380.205 Contractor implementation.**

(a) *Animal Welfare Assurance.* No activity involving animals will be supported by PHS until the institution conducting the activity has provided a written Assurance acceptable to PHS, setting forth compliance with the policy in this subpart for PHS-supported activities. Assurances shall be submitted to OPRR, Office of the Director, National Institutes of Health, 9000 Rockville Pike, Building 31, Room 4B09, Bethesda, Maryland 20892. The Assurance shall be typed on the institution's letterhead and signed by an institutional official. OPRR will provide the applicant institution with necessary instructions and an example of an acceptable Assurance. All Assurances submitted to PHS in accordance

with the policy will be evaluated by OPRR to determine the adequacy of the institution's proposed program for the care and use of animals in PHS-supported activities. On the basis of this evaluation, OPRR may approve or disapprove the Assurance, or negotiate an acceptable Assurance with the institution. Approval of an Assurance will be for a specified period of time (no longer than five years) after which time the institution must submit a new Assurance to OPRR. OPRR may limit the period during which any particular approved Assurance shall remain effective or otherwise condition, restrict, or withdraw approval. Without an applicable PHS approved Assurance, no PHS-supported activity involving animals at the institution will be permitted to continue.

(1) *Institutional program for animal care and use.* The Assurance shall fully describe the institution's program for the care and use of animals in PHS-supported activities. PHS requires institutions to use the *Guide for the Care and Use of Laboratory Animals (Guide)* as a basis for developing and implementing an institutional program for activities involving animals. The program description must include the following:

(i) A list of every branch and major component of the institution, as well as a list of every branch and major component of any institution which is to be included under the Assurance;

(ii) The lines of authority and responsibility for administering the program and ensuring compliance with this policy;

(iii) The qualifications, authority and responsibility of the veterinarian(s) who will participate in the program;

(iv) The membership list of the Institutional Animal Care and Use Committee(s) (IACUC)<sup>1</sup> established in accordance with the requirements set forth in this subpart;

<sup>1</sup>The name Institutional Animal Care and Use Committee (IACUC) as used in this policy is intended as a generic term for a committee whose function is to ensure that the

*Continued*

(v) The procedures which the IACUC will follow to fulfill the requirements set forth in this subpart;

(vi) The health program for personnel who work in laboratory animal facilities or have frequent contact with animals;

(vii) The gross square footage of each animal facility (including satellite facilities), the species housed therein and the average daily inventory, by species, of animals in each facility; and

(viii) Any other pertinent information requested by OPRR.

(2) *Institutional status.* Each institution must assure that its program and facilities are in one of the following categories:

(i) *Category 1*— Accredited by the American Association for the Accreditation of Laboratory Animal Care (AAALAC). All of the institution's programs and facilities (including satellite facilities) for activities involving animals have been evaluated and accredited by AAALAC, or another accrediting body recognized by PHS.<sup>2</sup>

(ii) *Category 2*— Evaluated by the Institution. All of the institution's programs and facilities (including satellite facilities) for activities involving animals have been evaluated by the IACUC and will be reevaluated by the IACUC at least once each year. The IACUC shall use the *Guide* as a basis for evaluating the institution's program and facilities.

A report of the IACUC evaluation shall be submitted to the institutional official and updated on an annual basis.<sup>3</sup> The initial report shall be submitted to OPRR with the Assurance. Annual re-

ports of the IACUC evaluation shall be maintained by the institution and made available to OPRR upon request. The report must contain a description of the nature and extent of the institution's adherence to the *Guide* and this policy.<sup>4</sup> The report must identify specifically any departures from provisions of the *Guide* and this policy, and state the reasons for each departure. If program or facility deficiencies are noted, the report must contain a reasonable and specific plan and schedule for correcting each deficiency. The report must distinguish significant deficiencies from minor deficiencies. A significant deficiency is one which, in the judgment of the IACUC and the institutional official, is or may be a threat to the health or safety of the animals. Failure of the IACUC to conduct an annual evaluation and submit the required report to the institutional official may result in PHS withdrawal of its approval of the Assurance.

(3) *Institutional Animal Care and Use Committee (IACUC).* (i) Each institution shall appoint an Institutional Animal Care and Use Committee (IACUC), qualified through experience and expertise of its members, to oversee the institution's animal program, facilities and procedures.

(ii) The Assurance must include the names, position titles and credentials of the IACUC chairperson and the members. The committee shall consist of not less than five members, and shall include at least:

(A) One Doctor of Veterinary Medicine, with training or experience in laboratory animal science and medicine, who has direct or delegated program responsibility for activities involving animals at the institution;

(B) One practicing scientist experienced in research involving animals;

(C) One member whose primary concerns are in a nonscientific area (for example, ethicist, lawyer, member of the clergy); and

(D) One individual who is not affiliated with the institution in any way

care and use of animals in PHS-supported activities is appropriate and humane in accordance with this policy. However, each institution may identify the committee by whatever name it chooses. Membership and responsibilities of the IACUC are set forth in PHS 380.205(d).

<sup>2</sup>As of the issuance date of this policy the only accrediting body recognized by PHS is the American Association for Accreditation of Laboratory Animal Care (AAALAC).

<sup>3</sup>The IACUC may, at its discretion, determine the best means of conducting an evaluation of the institution's programs and facilities. The IACUC may invite ad hoc consultants to conduct or assist in conducting the evaluation. However, the IACUC remains responsible for the evaluation and report.

<sup>4</sup>If some of the institution's facilities are accredited by AAALAC or other accrediting body recognized by PHS, the report should identify those facilities and need not contain any further information about evaluation of those facilities.

other than as a member of the IACUC, and is not a member of the immediate family of a person who is affiliated with the institution.

(iii) An individual who meets the requirements of more than one of the categories detailed in PHS 380.205(d)(2)(i)-(iv) above, may fulfill more than one requirement. However, no committee may consist of less than five members.

(b) *Functions of the Institutional Animal Care and Use Committee.* As an agent of the institution, the IACUC shall, with respect to PHS-supported activities:

(1) Review at least annually the institution's program for humane care and use of animals;

(2) Inspect at least annually all of the institution's animal facilities, including satellite facilities;

(3) Review concerns involving the care and use of animals at the institution;

(4) Make recommendations to the institutional official regarding any aspect of the institution's animal program, facilities or personnel training;

(5) Review and approve, require modifications in (to secure approval), or withhold approval of those sections of PHS applications or proposals related to the care and use of animals, as specified in PHS 380.205(f) of this subpart;

(6) Review and approve, require modifications in (to secure approval), or withhold approval of proposed significant changes regarding the use of animals in ongoing activities; and

(7) Be authorized to suspend an activity involving animals in accord with specifications set forth in this subpart.

(c) *Review of applications and proposals.* In order to approve applications and proposals or proposed changes in ongoing activities, the IACUC shall conduct a review of those sections related to the care and use of animals and determine that the proposed activities are in accordance with this policy. In making this determination, the IACUC shall confirm that the activity will be conducted in accordance with the Animal Welfare Act insofar as it applies to the activity, and that the activity is consistent with the *Guide*, unless the IACUC determines that acceptable justification for a departure is

presented. Furthermore, the IACUC shall determine that the activity conforms with the institution's Assurance and meets the following requirements:

(1) Procedures with animals will avoid or minimize discomfort, distress and pain to the animals, consistent with sound research design.

(2) Procedures that may cause more than momentary or slight pain or distress to the animals will be performed with appropriate sedation, analgesia, or anesthesia, unless the procedure is justified for scientific reasons in writing by the investigator.

(3) Animals that would otherwise experience severe or chronic pain or distress that cannot be relieved will be painlessly sacrificed at the end of the procedure or, if appropriate, during the procedure.

(4) The living conditions of animals will be appropriate for their species and contribute to their health and comfort. The housing, feeding and non-medical care of the animals will be directed by a veterinarian or a scientist trained and experienced in the proper care, handling and use of the species being maintained or studied.

(5) Medical care for animals will be available and provided as necessary by a qualified veterinarian.

(6) Personnel conducting procedures on the species being maintained or studies will be appropriately qualified and trained in those procedures.

(7) Methods of euthanasia used will be consistent with the recommendations of the American Veterinary Medical Association (AVMA) Panel of Euthanasia<sup>5</sup>, unless a deviation is justified for scientific reasons in writing by the investigator.

#### **PHS 380.206 Public Health Service implementation.**

(a) *Responsibility of the Office for Protection from Research Risks (OPRR).* OPRR is responsible for the general administration and coordination of this policy and will:

(1) Request and negotiate, approve or disapprove, and, as necessary, withdraw approval of Assurances;

<sup>5</sup> Journal of the American Veterinary Association (JAVMA), 1978, Vol. 143, No. 1, pp. 59-72, or succeeding revised editions.

(2) Distribute to executive secretaries of initial review and technical evaluation groups, and to PHS contracting offices, lists of institutions that have an approved Assurance;

(3) Advise contracting offices and awardee institutions concerning the implementation of this policy;

(4) Evaluate allegations of non-compliance with this subpart;

(5) Have the authority to review and approve or disapprove waivers of this subpart (see paragraph (d) of this section); and

(6) With other PHS officials, conduct site visits to selected institutions.

(b) *Responsibilities of PHS contracting offices.* PHS contracting offices shall not make an award for an activity involving animals unless the institution submitting the application or proposal is on the list of institutions that have an approved Assurance of file with OPRR, and the institutional official has provided verification of approval by the IACUC of those sections of the application or proposal related to the care and use of animals. If an institution is not listed, the contracting office shall ask OPRR to negotiate an Assurance with the institution before an award is made. No award shall be made until the Assurance has been submitted by the institution, approved by OPRR, and the institution has provided verification of approval by the IACUC of those sections of the application or proposal related to the care and use of animals in PHS-supported activities.

(c) *Conduct of special reviews/site visits.* Each awardee institution is subject to review at any time by PHS staff and advisors, which may include a site visit, to assess the adequacy of the institution's compliance with this policy.

(d) *Waiver.* Institutions may request a waiver of a provision of this policy by submitting a request to OPRR. No waiver will be granted unless sufficient justification is provided, and the waiver is approved in writing by OPRR.

### Subpart PHS 380.3—Acquisition of Drugs and Medical Supplies

#### PHS 380.301 Scope of subpart.

This subpart provides policies and procedures pertaining to the acquisition

of drug products and medical supplies by PHS or PHS's contractors.

#### PHS 380.302 Acquisition of drugs.

##### PHS 380.302-1 Policy.

(a) Drugs shall be acquired at the lowest possible price consistent with acceptable standards of identity, strength, quality, purity, safety and effectiveness, and with due regard for the welfare of the patient and the professional judgment of the prescriber.

(b) Contracting activities shall ensure that drugs are acquired by generic name on a competitive basis whenever it is possible to obtain therapeutically effective drugs of established quality. However, the professional judgment of the prescriber to request drugs by brand name or house designation must be recognized when the best interest of the patient requires it. Similarly, scientific investigators have the prerogative to request drugs having end-product characteristics considered necessary for the conduct of research or investigations.

(c) Prior to taking any acquisition action, the contracting officer shall ensure that the requested drug products are not available from mandatory sources such as Federal Supply Schedules. Part 103-26 of the HHS Material Management Manual describes sources of supply for drugs.

##### PHS 380.302-2 Solicitation and contract requirements.

The contracting officer should consider including statements similar to the following in solicitations and resultant contracts pertaining to drug products:

(a) The offeror (contractor) guarantees that all requirements established by the Food and Drug Administration, HHS, have been met. These requirements include: plant sanitation, manufacturing, packaging, labeling, identification, strength, quality, purity, safety, and effectiveness.

NOTE: The contracting officer may want to cite the applicable reference(s) pertaining to the FDA requirements.

(b) The offeror (contractor), by signing this document, guarantees/warrants that any applicable shelf-life requirements have been met and the furnished drugs are free from defects.

(c) The Government reserves the right to inspect the manufacturer's plant and premises during normal operating hours.

NOTE: FDA will normally conduct the inspection when requested, but may request to be reimbursed for the services.

(d) The offeror (contractor) agrees to submit either a comprehensive, certified analysis on each lot of drugs at the time of delivery of the drugs, or a comprehensive list of specifications met by the drugs along with a certificate of analysis, or other suitable documentation, verifying that the drugs meet the appropriate standards.

(e) The offeror (contractor) claims it is not currently listed as a disqualified bidder or offeror for drugs by any Federal agency or department.

(f) The offeror must set forth full, accurate, and complete information as required by this solicitation (including attachments). The penalty for making false statements in offers is prescribed in 18 U.S.C. 1001.

(g) If the offeror (prime contractor) plans to use (or uses) a subcontractor or secondary manufacturer for the furnishing of any or all the drug products under the resultant contract, the name and address of the subcontractor or secondary manufacturer is to be furnished the contracting officer, along with the drug lots affected. The prime contractor shall ensure that the subcontractor or secondary manufacturer complies with the above stated requirements.

#### **PHS 380.303 Acquisition of controlled drugs.**

(a) Controlled drugs include narcotics and dangerous drugs identified by the Drug Enforcement Administration (DEA), Department of Justice, in the regulations implementing the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Title 21 CFR Chapter II).

(b) The DEA issues a Controlled Substances Inventory List which provides general information pertaining to the ordering of controlled drug products

and the use of specific order forms. The local DEA regional office should be contacted to receive the list and instructions regarding registering and ordering forms, as well as other matters concerning the handling and processing of controlled drugs. Sections 103-27.6204(a)(2) and 103-27.6302(b) of the HHS Material Management Manual provide information on issuing, shipping, and safeguarding controlled drugs.

(c) Contracting officers shall ensure that requests for contracts or purchase requests are supported by the required DEA form prior to initiation of any action.

#### **PHS 380.304 Effectiveness of drug products.**

##### **PHS 380.304-1 General.**

(a) The National Academy of Sciences National Research Council (NAS-NRC) has established effectiveness classifications for the indication of drug products, based upon the following criteria:

(1) Factual information that is freely available in scientific literature;

(2) Factual information that is available from the Food and Drug Administration, the manufacturer, or other sources; and

(3) Experience and informed judgment of the members of NAS-NRC panels.

(b) The indications mentioned in the following categories refer to "the effect the drug purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling." That is, the indications are the claims noted in the labeling of a given drug product.

(1) *Category A—Effective.* For the presented indication, the drug is effective on the basis of the criteria cited in PHS 380.304-1(a) above.

(2) *Category B—Probably Effective.* For the indication presented, effectiveness of the drug is probable on the basis of the criteria cited in PHS 380.304-1(a) but additional evidence is required before it can be assigned to Category A.

(3) *Category C—Possibly Effective.* In relation to the indication in question, there is little evidence of effectiveness under any of the criteria cited in PHS

380.304-1(a). The possibility that additional supporting evidence might be developed should not be ruled out, however.

(4) *Category D—Ineffective.* In relation to the indication in question, there is no acceptable evidence under any of the criteria cited in PHS 380.304-1(a) to support a claim of effectiveness.

**PHS 380.304-2 Policy.**

(a) It is PHS policy to not acquire drug products classified “ineffective” or “possibly effective” for use in its direct care programs. However, there are two exceptions to this policy:

(1) Drug products categorized as “ineffective” and “possibly effective” may be acquired for use in the pursuit of approved clinical research products.

(2) Drug products categorized as “possibly effective” may be acquired when no alternate means of therapy with drug products in the “probably effective” or “effective” categories are available.

(b) This policy applies to similar drug products marketed by the same or other firms.

**PHS 380.304-3 Procedures.**

(a) The contracting officer, prior to initiating action on a purchase request or request for contract for drug products, shall ensure that the items are screened against current lists of products identified by the Pharmacy Liaison Officer, Public Health Service, to determine whether acquisition of the items is prohibited, and that the individual actually performing the screening has annotated and initialed the request.

(b) When the request is received for a drug product which is allowable under the exceptions stated in PHS 380.304-2, the contracting officer shall ensure that the appropriate justification is provided, that it is signed by the responsible program official, and that it is included in the contract or purchase request file.

(c) When the request for a restricted drug product cannot be resolved by the substitution of another item, the contracting officer shall consider the request as a deviation and process it in accordance with Subpart 301.4.

**PHS 380.304-4 Distribution of information.**

(a) The Pharmacy Liaison Officer, Public Health Service, has responsibility for distributing information on the effectiveness of drug products to the principal official responsible for acquisition. The principal official responsible for acquisition will be advised by telephone of drug products classified as “ineffective” or “possibly effective” prior to publication in the FEDERAL REGISTER, and will be provided a monthly list of these drug products following publication in the FEDERAL REGISTER.

(b) The principal official responsible for acquisition shall establish procedures for the distribution of information on the effectiveness of drug products and implement other controls necessary to assure compliance with the policy set forth in PHS 380.304-2.

**PHS 380.305 Maximum allowable cost for drugs.**

**PHS 380.305-1 General.**

(a) The regulation entitled “Limitation on Payment or Reimbursement for Drugs,” also known as the Maximum Allowable Cost or MAC regulation, is set forth in Part 19 to Subtitle A of Title 45 of the Code of Federal Regulations.

(b) The MAC regulation established departmental policies and procedures for determining allowable drug costs and, where applicable, dispensing fees to be used to establish:

(1) Reimbursement to providers and health maintenance organizations under the Medicare program;

(2) Reimbursement to States under State administered health, welfare, and social service programs; and

(3) Allowable costs under projects for health services.

**PHS 380.305-2 Applicability.**

(a) This regulation implements the MAC regulation by establishing acquisition procedures consistent with the purpose and intent of the MAC regulation.

(b) This regulation applies to the direct acquisition of drugs by PHS and the acquisition or supply of drugs by PHS contractors.

## Appendix A—Public Health Services

## PHS 380.402

(c) This regulation does not apply to the acquisition of drugs for research programs made by PHS and its contractors.

### **PHS 380.305-3 Responsibilities.**

(a) The program office which initiates the requirement is responsible for advising the contracting office as to the applicability of the MAC regulation to the proposed acquisition.

(b) The Pharmacy Liaison Officer, PHS, is responsible for distributing to the principal official responsible for acquisition of the MAC determination or data concerning the acquisition cost of drugs. The MAC determination should be furnished within thirty days after publication as a final rule in the FEDERAL REGISTER. Acquisition cost data should be furnished within thirty days after the effective date.

(c) The principal official responsible for acquisition shall establish procedures for disseminating MAC determinations and acquisition cost data and may initiate other actions necessary to ensure compliance with the requirements of this regulation.

### **PHS 380.305-4 Solicitation notification.**

(a) The contracting officer shall ensure that all requests for proposals and invitations for bids which are subject to the provisions of the MAC regulation contain a notice worded substantially as follows:

This acquisition is subject to the Maximum Allowable Cost (MAC) regulation set forth in Part 19 to Subtitle A of Title 45 of the Code of Federal Regulations.

(b) The contracting officer shall include the applicable MAC determination or acquisition cost data in the RFP or IFB.

(c) The referenced solicitation notice, or a notice worded similarly to it, is required to be included in all applicable solicitations issued by the contractor or its subcontractors.

### **PHS 380.305-5 Contract requirements.**

(a) The contracting officer shall include a clause entitled "Maximum Allowable Cost for Drugs," reading substantially as the clause cited in PHS

352.280-3, in all contracts subject to the provisions of the MAC regulation.

(b) The contracting officer shall incorporate in all contracts subject to the provisions of the MAC regulation the applicable MAC determination or acquisition cost data furnished in the solicitation.

(c) The clause cited in PHS 352.280-3, or a clause worded substantially as that clause, is required to be included in all applicable contracts awarded by the contractor or its subcontractors.

### **PHS 380.306 Acquisition of tax free and specially denatured alcohol.**

(a) All orders for tax free and specially denatured alcohol shall be placed with the HRSA Supply Service Center, Perry Point, MD. Orders shall be placed in accordance with the ordering instructions contained in the HRSA Medical Supply Catalog.

## **Subpart PHS 380.4—Contracts Under the Indian Self-Determination Act**

### **PHS 380.400 Scope of subpart.**

This subpart prescribes procedures for contracting by the Public Health Service (PHS) under the Indian Self-Determination Act (25 U.S.C. 450f).

### **PHS 380.401 Applicability of regulations.**

Contracts with tribal organizations resulting from the submission of Indian Self-Determination Contract Proposals as authorized in Public Law 93-638 shall be in accordance with 41 CFR Chapters 1 and 3, except as otherwise provided herein. If this subpart conflicts with any of the other provisions of 41 CFR Chapters 1 or 3, the provisions of this subpart govern.

### **PHS 380.402 Waivers.**

(a) The Secretary of Health and Human Services (HHS) waives Federal contract clauses that are normally contained in the General provisions of a contract to the extent that they are omitted from the General provisions prescribed for such contracts in this subpart.

(b) The Secretary may waive for the purpose of a specific contract other provisions of Federal contracting laws

or regulations as determined not appropriate in view of, or are inconsistent with, the provisions of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.). Requests for such waivers shall be in accordance with 42 CFR 36.216.

(c) Although it is PHS's policy to obtain competition whenever possible, any contract award to a tribal organization resulting from the submission of an Indian Self-Determination Contract Proposal will be effected without competition.

(d) Proposed contracts under section 103 of the Indian Self-Determination Act are exempted from the synopsis requirements of 41 CFR 1-1.1003. Although subcontracts are subject under section 7(b) of that act to a preference to Indian organizations and to Indian-owned economic enterprises, opportunities to so subcontract may be publicized by contracting officers as provided for in 41 CFR 1-1.1003-4.

**PHS 380.403 Negotiating authority.**

Contracts entered into pursuant to section 103 of the Indian Self-Determination Act (25 U.S.C. 450g) will cite as the negotiating authority 41 U.S.C. 252(c)(15) and 25 U.S.C. 450g.

**PHS 380.404 Definitions.**

The definitions prescribed in 42 CFR 36.204 are applicable to this subpart.

**PHS 380.405 Types of contracts.**

(a) Cost-reimbursement contracts will be used for all contracts made pursuant to this subpart between PHS and an Indian tribe or tribal organization. In addition to other provisions as the Secretary may from time to time require, the cost-reimbursement contracts shall contain the terms set out in PHS 352.280-4(a).

(b) Fixed-price contracts may be used in only these instances where costs can be precisely established. In addition to other provisions as the Secretary may from time to time require, the fixed-price contracts shall contain the terms set out in PHS 352.280-4(b).

(c) Cost sharing contracts may be used where the tribe contributes to the cost of a program and may specify a percentage of cost or fixed amount to be funded by the Government.

**PHS 380.406 Term of contract.**

(a) The term of contracts awarded under the Act shall not exceed one year except that contracts may be made for a longer term up to three years subject to the availability of appropriations under the following circumstances:

(1) The services provided under the contract can reasonably be expected to be continuing in nature and, as a result, a longer contract term would be advantageous.

(2) The Indian tribe or tribes to be served by the contract request that the term be more than one year. The tribal organizational will indicate the desired term of the contract in the Self-Determination Contract Proposal.

(b) Contract made for a term of more than one year may be renegotiated annually to reflect factors which include, but need not be limited to, cost increases beyond the control of the tribal contractor. Proposed changes in the services provided under the contract which reflect changes in program emphasis may be considered during the annual renegotiation if the changes fall within the general scope of the contract.

**PHS 380.407 Exemption from bonds.**

A tribal organization is not required to furnish performance and payment bonds before carrying out a contract under this subpart for the construction of public buildings or works as required by the Miller Act of August 24, 1935 (49 Stat. 793), as amended. However, the tribal organization shall require each of its subcontractors other than tribal organizations, to furnish both performance and payment bonds as follows:

(a) A performance bond with a surety or sureties satisfactory to the approving official, and in an amount he/she deems adequate, for the protection of the United States.

(b) A payment bond with a surety or sureties satisfactory to the approving official for the protection of all persons supplying labor and material in the prosecution of the work provided for in the contract. Whenever the total amount payable by the terms of the contract is not more than \$1,000,000, the payment bond shall be one-half the total amount payable by the terms of the contract. Whenever the total

## Appendix A—Public Health Services

## PHS 380.500

amount payable by the terms of the contract is more than \$1,000,000 but not more than \$5,000,000, the payment bond shall be 40 percent of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract is more than \$5,000,000, the payment bond shall be \$2,500,000.

### **PHS 380.408 Acquisition of construction and architect-engineering service contract.**

(a) This section sets forth procedures and requirements peculiar to construction and architect-engineering service contracts. The terms and conditions of these contracts when negotiated with an Indian tribe or tribal organization pursuant to the Act shall, to the extent applicable, be in accordance with the requirements set forth in 41 CFR Part 1-18 and Subpart 1-4.10. However, if there is a conflict between 41 CFR Part 1-18 and Subpart 1-4.10, and any provision of the Act or 42 CFR Part 36, the Act or 42 CFR Part 36 shall govern. In addition these contracts shall include the special provisions identified in PHS 380.410.

#### **(b) Exceptions.**

(1) Subpart 1-18.10 of this title is not applicable.

(2) The contract clauses required by §1-18.703-1 of this title shall be inserted in construction contracts with an Indian tribe or tribal organization which serves as a governmental instrumentality of an Indian tribe, but shall be prefaced by the provision contained in §1-18.702-3 of this title.

(3) In all cases, the contracting officer shall obtain and insert the Wage Determination Decision issued by the Secretary of Labor in the contract prior to award of any contract for construction that falls within the purview of the Davis-Bacon Act. The Wage Determination Decision should be furnished sufficiently in advance of the contract award date to permit full consideration by the tribal organization and any prospective subcontractors.

### **PHS 380.409 Performance of personal services.**

Any contract made under this subpart may include provisions for the performance of personal services which

would otherwise be performed by Federal employees. Such services include, but are not limited to, performing the following functions in connection with the contract and applicable rules and regulations:

(a) Determining the eligibility of applicants for assistance, benefits, or services.

(b) Determining the extent or amount of assistance, benefits, or services to be provided.

(c) Providing such assistance, benefits, or services.

### **PHS 380.410 Special provisions of Indian Self-Determination contracts.**

Contracts entered into pursuant to Section 103 of the Indian Self-Determination Act must incorporate special clauses which are consistent with those prescribed in Subpart I of Part 36 of 42 CFR on the following subjects:

(a) Fair and equal treatment of Indian people.

(b) Use of Indian business concerns.

(c) Indian preference in training and employment.

(d) Indemnity and insurance.

(e) Reports to the Indian people.

(f) Penalties.

(g) Retrocession.

(h) Assumption and reassumption of contract programs.

### **PHS 380.411 General provisions.**

General provisions are published in these regulations (see PHS 352.280-4 for text of clauses) in order to respond to the expressed desire of the Indian people, to have published in one place, all of the terms and conditions applicable to contracts awarded under the Act. These general provisions incorporate the special clauses whose titles are listed in PHS 380.410, above, as well as applicable standard contract clauses.

## **Subpart PHS 380.5—Acquisitions Under the Buy Indian Act**

### **PHS 380.500 Scope of subpart.**

This subpart sets forth the policy on preferential acquisition from Indians under the negotiation authority of the Buy Indian Act. Applicability of this subpart is limited to acquisitions made by or on behalf of the Indian Health Service of the Public Health Service.

**PHS 380.501 Policy.**

(a) The Indian Health Service will utilize the negotiation authority of the Buy Indian Act to give preference to Indians whenever the use of that authority is authorized and is practicable. The Buy Indian Act was enacted as a proviso to Section 23 of the Act of June 25, 1910, Chapter 431, Pub. L. 313, 61st Congress, 36 Stat. 861, and prescribes the application of the advertising requirements of section 3709 of the Revised Statutes to the acquisition of Indian supplies. As set out in 25 U.S.C. 47, the Buy Indian Act provides as follows:

So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

(b) The functions, responsibilities, authorities, and duties of the Secretary of the Interior for maintenance and operation of hospital and health facilities for Indians and for the conservation of the health of Indians were transferred to the Secretary of Health, Education, and Welfare, on July 1, 1955 by Pub. L. 568, 83rd Congress, 42 U.S.C. 2001 et seq. Accordingly, the Secretary of Health and Human Services is authorized to use the Buy Indian Act in the acquisition of products of Indian industry in connection with the maintenance and operation of hospital and health facilities for Indians and for the conservation of the health of Indians. This authority has been delegated exclusively to the Indian Health Service and is not available for use by any other HHS component (unless that component is making an acquisition on behalf of the Indian Health Service).

(c) Use of the Buy Indian Act negotiation authority has been emphasized in subsequent legislation, particularly Pub. L. 94-437 and Pub. L. 96-537.

**PHS 380.502 Definitions.****PHS 380.502-1 Indian.**

Indian means a member of any tribe, pueblo, band, group, village or community that is recognized by the Secretary of the Interior as being Indian or any individual or group of individuals that is recognized by the Sec-

retary of the Interior or the Secretary of Health and Human Services. The Secretary of Health and Human Services in making such determinations may take into account the determination of the tribe with which affiliation is claimed.

**PHS 380.502-2 Indian firm.**

Indian firm means a sole enterprise, partnership, corporation, or other type of business organization owned, controlled, and operated by one or more Indians (including, for the purpose of sections 301 and 302 of Pub. L. 94-437, former or currently federally recognized Indian tribes in the State of New York) or by an Indian firm; or a non-profit firm organized for the benefit of Indians and controlled by Indians (see PHS 380.503(a)).

**PHS 380.502-3 Product of Indian industry.**

Product of Indian industry means anything produced by Indians through physical labor or by intellectual effort involving the use and application of skills by them.

**PHS 380.502-4 Buy Indian contract.**

Buy Indian contract means any contract involving activities covered by the Buy Indian Act that is negotiated under the provisions of 41 U.S.C. 252(c)(15) and 25 U.S.C. 47 between an Indian firm and a contracting officer representing the Indian Health Service.

**PHS 380.502-5 Buy Indian restricted advertising.**

Buy Indian restricted advertising is a special method of negotiated acquisition conducted in the same manner as a formally advertised acquisition, except that competition and award are restricted to Indian firms (see FAR 19.101). Thus, a Buy Indian acquisition may be considered an acquisition set-aside for Indian firms in the manner that some acquisitions are set-aside for small business concerns (see FAR 19.101). Set-aside acquisitions are, technically, negotiated acquisitions but should be conducted as if they were formally advertised acquisitions in instances where the formal advertising method would be used if the set-aside was not in effect.

**PHS 380.503 Requirements.**

(a) *Indian ownership.* The degree of ownership that is called for by PHS 380.502-2 shall be 100 percent during the period covered by a Buy Indian contract unless a deviation from that 100 percent requirement is approved on an individual basis by the cognizant Area or Program Office Director of the Indian Health Service. Such a deviation, which may be to not less than 51 percent, must be accompanied by an appropriate justification for the deviation.

(b) *Joint ventures.* An Indian firm may enter into a joint venture with other entities for specific projects as long as the Indian firm is the managing partner. However, the joint venture must be approved by the contracting officer prior to the award of a contract under the Buy Indian Act.

(c) *Bonds.* In the case of contracts for the construction, alteration, or repair of public buildings or public works, performance and payment bonds are required by the Miller Act (40 U.S.C. 270a) and Part 28 of the Federal Acquisition Regulation (48 CFR Ch. 1). In the case of contracts with Indian tribes or public nonprofit organizations serving as governmental instrumentalities of an Indian tribe, bonds are not required. However, bonds are required when dealing with private business entities which are owned by an Indian tribe or members of an Indian tribe. Bonds may be required of private business entities which are joint ventures with, or subcontractors of, an Indian tribe or a public nonprofit organization serving as a governmental instrumentality of an Indian tribe. A bid guarantee or bid bond is required only when a performance or payment bond is required.

(d) *Indian preference in employment, training and subcontracting.* Contracts awarded under the Buy Indian Act are subject to the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638), which requires that preference be given to Indians in employment, training, and subcontracting. Subpart 370.2 and the contract clauses in 352.270-2 and 352.270-3 represent the Department's implementation of section 7(b). The Indian Preference clause set forth in 352.270-2 shall be included in

all Buy Indian solicitations and resultant contracts. The Indian Preference Program clause set forth in 352.270-3 shall be used as specified in 370.202(b). All requirements set forth in Subpart 370.2 which are applicable to the instant Buy Indian acquisition shall be followed by the contracting officer, e.g., sections 370.204 and 370.205.

(e) *Subcontracting.* Not more than 50 percent of the work to be performed under a prime contract awarded pursuant to the Buy Indian Act shall be subcontracted to other than Indian firms. For this purpose, work to be performed does not include the provision of materials, supplies, or equipment.

(f) *Wage rates.* A determination of the minimum wage rates by the Secretary of Labor as required by the Davis-Bacon Act (40 U.S.C. 276a-5) shall be included in all contracts awarded under the Buy Indian Act for over \$2,000 for construction, alteration, or repair, including painting and decorating, of public buildings and public works, except contracts with Indian tribes or public nonprofit organizations serving as governmental instrumentalities of an Indian tribe. The wage rate determination is to be included in contracts with private business entities even if they are owned by an Indian tribe or members of an Indian tribe and in connection with joint ventures with, or subcontractors of, an Indian tribe or a public nonprofit organization serving as a governmental instrumentality of an Indian tribe.

**PHS 380.504 Competition.**

(a) Contracts to be awarded under the Buy Indian Act shall be subject to competition among Indians or Indian concerns to the maximum extent that competition is determined by the contracting officer to be practicable, pursuant to FAR 14.101 and FAR 15.105. When competition is determined not to be practicable, a Justification for Noncompetitive Acquisition shall be prepared in accordance with 315.7105 and subsequently retained in the contract file.

(b) Notwithstanding the provisions of Subpart 315.71, a request for approval of noncompetitive acquisitions to be negotiated under the Buy Indian Act may, if \$25,000 or less, be approved by